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ALEXANDER L. STEVAS

No. 81-1843

In the Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

JOHN ANDREAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether an individual has no interest protected by the Fourth Amendment in a package that has been subjected to a lawful customs inspection and then delivered to him under controlled conditions after the discovery of illicit drugs.

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IN THE

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OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

Petitioner, People of the State of Illinois, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, which was entered on September 15, 1981.

OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1st Dist. 1981), and appears herein as Appendix A. The ruling of the trial court on respondent's motion to suppress evidence is not reported, and appears herein as Appendix B. The order of the Illinois Supreme Court of February 2, 1982, denying petitioner's

petition for leave to appeal is reported at 88 Ill. 2d 20 (1982), and appears herein as Appendix C.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 15, 1981. A timely petition for leave to appeal was denied by the Illinois Supreme Court on February 2, 1982. That order appears herein as Appendix C. This petition was filed within 60 days from that date. This court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The Search

On the morning of February 21, 1979, Ronald Drozek, a United States Customs Inspector, was assigned to the Lufthansa cargo facility at O'Hare Airport, Chicago, Illinois. (R. 41) Pursuant to his duties as a Customs Inspector, Mr. Drozek reviewed documents pertaining to a container which had been shipped from Calcutta, India, and was addressed to respondent at 61 Goethe Street, Chicago, Illinois. (R. 41) After re-

viewing the documents, he examined the cargo which was enclosed in a sheet metal container approximately 4 feet long, 4 feet wide, and 1½ feet thick. (R. 26, 35, 42)

Inspector Drozek opened the container with keys attached to the airline documents and found a table top approximately 3 feet in diameter and 8 to 10 inches thick. (R. 4, 26, 43) After drilling into the table, he discovered a substance which field tested positive for marijuana. (R. 4-5, 43) He then contacted Drug Enforcement Administration agents who confirmed that the substance being smuggled into the United States was marijuana. He then arranged for a controlled delivery of the container and contraband by the DEA to respondent.

The following day, February 22, 1979, DEA Agent Kenneth Labek and Chicago Police Officer Wayne Lipsek received the resealed container from Customs Inspector Drozek and delivered it to respondent at 61 Goethe Street. (R. 15-16, 31) Officer Lipsek was dispatched to obtain a state search warrant while Agent Labek maintained surveillance on respondent's apartment. (R. 16, 17, 22, 23, 31, 28) Approximately 30 minutes later, Agent Labek observed respondent in the hallway with the container. (R. 32, 37-38) He placed respondent under arrest and seized the container. (R. 17) Officer Lipsek was radioed and told to disregard the warrant because respondent had already been arrested. (R. 38)

Agent Labek then transported the container to Chicago Police Headquarters at 1121 South State Street where the container was opened and the table removed. (R. 18 35-37, 39) The table was then opened and the marijuana which had been previously uncovered by Customs Inspector Drozek was recovered. (R. 37, 68) The marijuana had a street value of $100,000.

Rulings on Motion to Suppress

Prior to trial, respondent moved to suppress the marijuana. He alleged that the reopening of the container violated his rights under the Fourth Amendment to the United States Constitution. (R. 91-92) The People asserted that because the container in which the contraband had been secreted was lawfully searched during a legal customs inspection search and was thereafter delivered to defendant under controlled conditions, the defendant had no legitimate expectation in the container or its contents and consequently the reopening of the container was lawful. The trial court, erroneously believing that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), necessitated the obtaining of a search warrant for the reopening of a container following a controlled delivery, suppressed the evidence. (R. 61-62)

On appeal the People again asserted that after the smuggled contraband had been discovered during a lawful customs inspection, the defendant had no reasonable expectation of privacy in the container. In support of their argument the petitioner noted that the decisions in *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980) and *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980), had held that the subsequent reopening of the container was merely a reassertion of control over the container because it had previously been the subject of a proper customs search and a controlled delivery. The Illinois Appellate Court, rejecting the reasoning and holdings of the Seventh and Tenth Circuit Courts, held that because the contraband had not been seized at the Customs check point, respondent's Fourth Amendment rights were somehow violated when the container was reopened after the controlled delivery.

Petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court.

REASON FOR GRANTING THE WRIT

THE ILLINOIS APPELLATE COURT, REJECTING THE CONTRARY DETERMINATION BY SEVERAL UNITED STATES CIRCUIT COURTS OF APPEALS AS WELL AS THIS COURT'S DETERMINATION THAT THE FOURTH AMENDMENT PROTECTS ONLY LEGITIMATE EXPECTATIONS OF PRIVACY, ERRONEOUSLY HELD THAT RESPONDENT POSSESSED A PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE THAT HAD BEEN SUBJECTED TO A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO HIM UNDER CONTROLLED CONDITIONS.

The Illinois Appellate Court, rejecting the contrary determinations by the Seventh Circuit in *United States v. Bulgier*, 618 F.2d 472 (1980) and the Tenth Circuit in *United States v. Andrews*, 618 F.2d 646, *cert. denied*, 449 U.S. 824 (1980), held that the warrantless reopening of a container violated respondent's Fourth Amendment rights where the container had been lawfully searched during a customs inspection, contraband discovered secreted therein, and the container then delivered to respondent under controlled conditions. The holding of the Illinois Appellate Court from which the writ of *certiorari* herein is sought is not only contrary to the purpose and intent of *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), and their progeny *Walter v. United States*, 447 U.S. 649 (1980), but adds an entirely new and unwarranted dimension to this Court's determination that the Fourth Amendment only protects an individual's legitimate expectations of privacy. Although this Court has never addressed this "oft-recurring" and as yet unresolved issue, as Mr. Justice Rehnquist noted in granting a stay in a case in which this issue was raised but not reached,

> The case presents important issues regarding the level of expectation of privacy a recipient of a package containing contraband shipped through the international mails may have when the packages have been previously subjected to a lawful customs search and delivered under controlled conditions and constant surveillance. *California v. Riegler*, 449 U.S. 1319, *cert. granted, judgment vacated and remanded,* 453 U.S. ____, 101 S.Ct. 2680 (1981).

Although this Court has not yet reached this issue, the majority of courts that have recognized that the recipient of a package that was the subject of a proper customs search and then delivered to him under controlled conditions has no legitimate expectation of privacy in the package and that any subsequent seizure and search of the package is merely a reassertion of control over the package. These courts have therefore held that after a lawful customs inspection and discovery the recipient has no rights in the package which are protected by the Fourth Amendment and therefore, no warrant is required to justify the subsequent search and seizure. *United States v. Washington*, 586 F.2d 1147 (7th Cir. 1979); *United States v. Garcia*, 605 F.2d 349 (7th Cir. 1979), *cert. denied*, 446 & S. 984 (1980); *United States v. Emery*, 541 F.2d 887 (1st Cir. 1976), *overruled on other grounds, United States v. Miller*, 636 F.2d 850 (1st Cir. 1980); *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975), *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973).

Some courts however, in the erroneous belief that an individual has a legitimate expectation of privacy in a package following a lawful customs inspection and the discovery of contraband, have decided that the controlled delivery package is simply another *Sanders* container and that the recipient's

Fourth Amendment rights are therefore violated if no warrant is secured prior to the reopening of the package. *People v. Andreas*, 100 Ill. App. 3d 396, 426 N.E.d 1078 (1st Dist. 1981); *People v. Riegler*, 111 Cal. App. 3d 582, 168 Cal. Rptr. 816 (1980). The Petitioner respectfully submits that the minority view adopted by the Illinois Court in the instant case and by the California Court in *Riegler* represents not only an unwarranted expansion and misapplication of the principle that the Fourth Amendment protects only legitimate expectations of privacy and a divisive conflict among the many courts of the United States, but also an unresolved and "oft-recurring issue that should finally be resolved by this Court.

As this Court has long held, the Fourth Amendment protects only those areas in which a person has a legitimate expectation of privacy, not those areas in which he holds a mere subjective belief that no one will enter. *Katz v. United States*, 389 U.S. 347 (1967); *Rakas v. Illinois*, 439 U.S. 128 (1978). Indeed, an individual must establish a legitimate expectation of privacy in the area searched as a constitutional prerequisite to establishing a Fourth Amendment violation. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Further, as regards items sent through the mails, when the consignor of a package has "reason to assume that it would be opened before it arrives at its designation," as is certainly true in the case of a package shipped across the border, he has no expectation of privacy in the package which will be recognized as legitimate for purposes of the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, n. 12. Thus, while a person may believe that he has found the perfect hiding place, he can have no reasonable or protected expectation that he or his possessions will not be discovered if others have the right to inspect the contents of the package.

In the case at bar, respondent could have had no legitimate expectation of privacy in the contents of the container. The

contraband was packaged inside a table top and shipped through the international mail from Calcutta, India, to respondent at his apartment in Chicago, Illinois. Although every package shipped across the border is not searched, any package may properly and lawfully be searched and seized by Customs officers as it crosses the border. *United States v. Ramsey*, 431 U.S. 606 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In fact, in the case at bar, the package was indeed searched by a customs inspector as it crossed the border and the contraband was discovered. Therefore, respondent could have had no expectation of privacy, legitimate or otherwise, in the contents of the package and its subsequent seizure violated no right of respondent which was protected by the Fourth Amendment. *United States v. Washington*, 586 F.2d 1147 (7th Cir. 1979); *United States v. Garcia*, 605 F.2d 349 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980). Indeed, as was held in *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980) and in *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), a subsequent warrantless search of a package that has already been lawfully searched and then delivered under controlled conditions violates no right protected by the Fourth Amendment. As these courts have recognized, the subsequent search is merely the reassertion of control over the package and its contents which does not implicate the Fourth Amendment.

Although recognizing the legitimacy of the initial search and the discovery of the marijuana by the customs inspector (Pet. 7a), the Illinois Appellate Court nevertheless felt that defendant possessed a protected expectation of privacy in the package. Confusing the constitutional distinction between a subjective and a legitimate expectation of privacy, the Illinois Court believed that the decisions in *United States v. Chadwick*, 443 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), required the suppression of the marijuana because no warrant had been secured prior to the reopening of the

package. The Appellate Court mistook this Court's comment in *Sanders* that "[t]he mere reasonableness of a search assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment," 442 U.S. at 758, for a judicial command that a warrant is required anytime a package is seized, regardless of the surrounding circumstances.

The Illinois Court, blindly equating the container in the instant case, which had previously been subjected to a lawful search and delivered under controlled conditions, to the double locked footlocker in *Chadwick* and the suitcase in *Sanders*, both of which had never been subjected to a prior lawful search or seizure, believed that respondent had a legitimate expectation of privacy in the smuggled contraband that arose when Customs Inspector Drozek resealed the container and arranged for its controlled delivery. This belief is patently erroneous. See, *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980).

Although *Chadwick* and *Sanders* did hold that a warrant was required before the containers involved there were opened, there is a difference of Constitutional dimension between those searches and the one involved here. In both *Sanders* and *Chadwick* the respondents had manifested an expectation that the contents of their respective packages would remain free from public examination. In contrast, when the instant respondent arranged for the contraband to be sent to him from India through the international mail, he manifested a specific recognition that the package would be the object of a lawful customs inspection. And, this Court has certainly never so much as suggested that an individual has a Constitutionally protected expectation of privacy in a package when, by his own actions, that person causes the contents of his

package to be exposed to public examination. In fact, it could not have done so without rejecting its express determination in *Rakas and Rawlings* that the Fourth Amendment only protects legitimate expectations of privacy.

What the minority view, as expressed by the Illinois Court in the case at bar, fails to appreciate is that the prior lawful customs inspection of the container prevented the table top from being a mere *Chadwick* or *Sanders* package. Rather, as noted by the Seventh Circuit Court of Appeals in distinguishing *Sanders* and *United States v. Berry*, 560 F.2d 861 (7th Cir. 1977):

> Except for the facts that *Sanders* involved luggage and *Berry* involved an attache case, the two cases bear little factual resemblence to the present case, which involves luggage but also involves an earlier private search by nongovernment persons and a "controlled delivery" by the government to the defendant. *United States v. Bulgier*, 618 F.2d 472, 475-476 (7th Cir. 1980).

In summary, the minority view, as most recently expressed by the holding of the Illinois Appellate Court in the case at bar, is not only in direct conflict with the fundamental principle consistently espoused by this Court that the Fourth Amendment protects only legitimate expectations of privacy, but represents a divisive conflict among the many courts of the United States. Moreover, although this Court has never addressed the issue now squarely presented, as Justice Rehnquist recognized in granting a stay in *Riegler*, the issue represents a very important Fourth Amendment question that should be resolved by this Court. Therefore, petitioner respectfully urges this Court to grant this petition and to issue the writ so that this Court may finally decide the "oft-recurring" issue left unresolved in *Chadwick, Sanders* and *Walters,* and which has generated considerable conflict among the various courts of the United States.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully pray that a writ of *certiorari* issue to review the judgment of the Illinois Appellate Court, First Judicial District, Second Division.

Respectfully submitted,

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April 3, 1982

APPENDIX A
OPINION OF THE APPELLATE COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, *v.* JOHN ANDREAS, Defendant-Appellee.

First District (2nd Division) No. 80-1963

Judgment affirmed.

Opinion filed September 15, 1981.

APPEAL from the Circuit Court of Cook County; the Hon. MARK E. JONES, Judge, presiding.

Richard M. Daley, State's Attorney, of Chicago (Marcia B. Orr, Adrienne Noble Nacev, and Alexander Vroustouris, Assistant State's Attorneys, of counsel), for the People.

Patrick G. Reardon and Lawrence J. Suffredin, Jr., both of Chicago, for appellee.

Mr. PRESIDING JUSTICE HARTMAN delivered the opinion of the court:

Defendant was charged with two counts of possession of controlled substances. (Ill. Rev. Stat. 1979, ch. 56½, pars. 704(e) and 705(e).) The State appeals the trial court's ruling sustaining defendant's motion to suppress evidence based on the opening of a container by the police in the absence of a search warrant and raises the issue of whether contraband found within the container as the result of the search was properly suppressed. We affirm for the following reasons.

A hearing was conducted on defendant's motion to suppress on May 22, 1980, during which the following evidence was considered. United States Customs Inspector Ronald Drozek testified that on February 21, 1979, he was working at the Lufthansa cargo facility at O'Hare Field. He reviewed the airline documents of a particular piece of cargo which revealed that is was shipped from Calcutta, India, and consigned to

defendant at an apartment on East Goethe Street in Chicago. The cargo consisted of a sheet metal container four feet square, 1½ feet thick, and fastened by two locks. Drozek opened the container by using the keys attached to the airline documents and found within a "dark reddish or a brownish" wooden table approximately three feet in diameter and eight to ten inches thick. He drilled into the table, determined it was hollow, and, after further drilling, obtained a substance from the table which tested positively for marijuana. Drozek the contacted Federal Drug Enforcement Administration (hereinafter DEA) agents and informed them of his findings.

Kenneth J. Labek, DEA special agent, testified that on February 21, 1979, he was informed by Customs of their possession of a table, which had been removed from a container shipped from India, and which was found to contain marijuana. Later that day, Labek saw the table and tested the substance it contained. His test confirmed that it was marijuana. Labek next saw the metal container within which the table was allegedly repackaged at Customs on February 22, 1979. He was not present when the table was repackaged and he could not see into the resealed container. Labek placed the container in a government van and drove to the building on East Goethe, where defendant lived. There, he met Chicago Police Investigator Wayne Lipsek and Sergeant Phil Cline. Labek and Lipsek, posing as delivery men, entered the apartment building and advised security personnel that they had a package for defendant. Minutes later defendant appeared in the lobby and identified himself as John Andreas. Labek told defendant he had a package for him, and defendant replied, "Good. Where is it?" Labek told him it was in the van, and defendant offered to help to carry it into the building.

At defendant's request, the container was brought to the hallway outside his apartment door. Labek and Lipsek then walked to the end of the hall and stationed themselves around

the corner. Labek observed defendant pull the container into his apartment out of Labek's sight. Thirty or forty-five minutes elapsed between the delivery and defendant's arrest. During that time Labek was either in the hallway or on another floor of the building. He did not keep defendant's apartment under continuing surveillance. Lipsek left the building after delivery of the package to obtain a State search warrant. Five minutes after defendant pulled the package into the apartment, Labek observed defendant exit the apartment and walk to a window or doorway at the end of the hallway. He looked outside, in both directions and downward and then reentered his apartment. Labek next observed defendant in the hallway with the container, at which time he was placed under arrest and the container was seized. Labek testified the container next to defendant was the same as that delivered earlier. Labek and Lipsek placed the container into the van and took it to the Chicago Police Department Headquarters at 11th and State Streets. Labek did not observe the contents of the container during this time and was not present when it was opened.

Lipsek testified that after he had left defendant's residence to get a search warrant for the apartment and the container, he received a radio message advising him that defendant had been arrested and to disregard the warrant, which he did. He apparently returned to the apartment and assisted in taking defendant into custody and in the removal of the container to police headquarters. He could not see into the container when it was seized, as it was closed. He was present later that evening when, at police headquarters, the container was opened, the table within it was broken apart, and marijuana was found within. At that time defendant was in custody, but not present. No State or Federal warrant of any kind had been secured.

On June 3, 1980, the court granted defendant's motion to suppress. The State appeals from that ruling.

I

Both parties agree that whether the warrantless search of the container at police headquarters offends the Fourth Amendment depends upon whether defendant had a legitimate expectation of privacy in the contents of the container. (*Katz v. United States* (1967), 389 U.S. 347, 351, 19 L. Ed. 2d 576, 582, 88 S. Ct. 507, 511; *Rakas v. Illinois* (1978), 439 U.S. 128, 143, 58 L. Ed. 2d 387, 401, 99 S. Ct. 421, 430.) Defendant submits, and we agree, that *United States v. Chadwick* (1977), 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (hereinafter *Chadwick*), and *Arkansas v. Sanders* (1979), 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (hereinafter *Sanders*) are controlling in this regard. In *Chadwick*, agents had probable cause to believe that a footlocker which defendants had transported by train contained marijuana. When the defendants claimed the footlocker, the agents arrested them and seized the footlocker. It was searched without a warrant, while under the exclusive control of Federal agents, 1½ hours after the arrests.

The Supreme Court in *Chadwick* held that the contents of the footlocker were clearly under the protection of the Fourth Amendment:

> "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." 433 U.S. I. II. 53 L. Ed. 2d 538, 548, 97 S. Ct. 2476, 2483.

1. In *Sanders* the Supreme Court, applying *Chadwick*, concluded that the warrantless search of an unlocked suitcase based upon probable cause was similarly unauthorized. Both cases thus hold that in such circumstances, probable cause alone does not eliminate the warrant requirement: "The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." (*Sanders*, 442 U.S. 753, 758, 61 L. Ed. 2d 235, 241, 99 S. Ct. 2586, 2590.) (Accord, *People v. Hamilton* (1979), 74 Ill. 2d 457, 386 N.E.2d 53; *People v. Redmond* (1979), 73 Ill. App. 3d 160, 390 N.E.2d 1364; *People v. Vogel* (1978), 58 Ill. App. 3d 910, 374 N.E.2d 1152; *People v. Von Hatten* (1977), 52 Ill. App. 3d 338, 367 N.E.2d 566.) Defendant at bar manifested the same "expectation that the contents would remain free from public examination" as did defendant in *Chadwick*. His expectation of privacy in a sealed package was at least as viable as one's expectation of privacy in an unlocked suitcase. (See *Sanders*, 442 U.S. 753, 762 n.9, 61 L. Ed. 2d 235, 244, n.9, 99 S. Ct. 2586, 2592 n.9.) The fact that Customs agents may have had the right to inspect the package does not diminish all legitimate expectations of privacy from governmental intrusion into packages that have been shipped. See *e.g., United States v. Kelly* (8th Cir. 1976), 529 F.2d 1365.

The State contends that *Chadwick* and *Sanders* are not controlling in the case at bar because once Customs officials lawfully opened the container and searched it, finding contraband, defendant no longer had a reasonable expectation of privacy in the container, relying upon *United States v. Emery* (1st Cir. 1976), 541 F.2d 887, 889-90, *overruled on other grounds by United States v. Miller* (1st Cir. 1980), 636 F.2d 850, 854, *United States v. Washington* (7th Cir. 1978), 586 F.2d 1147, 1154, and *United States v. Garcia* (7th Cir. 1979), 605 F.2d 349, 354, *cert. denied* (1980), 446 U.S. 984, 64 L. Ed.2d 261. 100

St.Ct. 1835. In both *Emery* and *Washington*, the courts found proper the insertion of electronic tracking devices into packages which were found, after lawful searches by Customs agents, to contain contraband. After the devices were inserted, the packages were delivered to each defendant, and were subsequently seized by officials. The courts did indeed find that the insertion of such devices did not violate defendants' justifiable expectation of privacy in the contraband goods. In neither case, however, was the fact that the package contained contraband said to justify the subsequent search occurring after the contraband was seized from defendants; the searches at issue in those cases were those which occurred when the beeper devices were inserted. To be noted also, in *Emery*, officials secured a search warrant prior to entering the apartment in which defendants (and the contraband) were quartered and, in *Washington*, a court order had been secured authorizing the placement of the electronic beacon in the package prior to its insertion therein. *Garcia* is similarly inapposite in this context since it concerns a warrantless search of easily movable hand luggage incident to and contemporaneous with a lawful arrest. The State's reliance upon other Federal and State cases considering this issue which predate *Chadwick* and *Sanders* is misplaced in light of the law now established by the latter cases.

The State nevertheless maintains that, given the legitimacy of the original search by Customs agents, the subsequent search of the container at the police station was lawful since the container was the object of a "controlled delivery." Where there is a prior legal search of property, a valid seizure by police officers predicated upon that search, and a delivery to the addressee made under the direction and control of police, a subsequent search which occurs at the termination point of the delivery may be conducted without a warrant as it constitutes a reassertion of possession and is deemed part of the first search and seizure. (*United States v. Bulgier* (7th Cir.

1980), 618 F.2d 472, *cert. denied* (1980), 449 U.S. 843, 66 L. Ed. 2d 51, 101 S. Ct. 125; *United States v. Andrews* (10th Cir. 1980), 618 F.2d 646, *cert. denied* (1980), 449 U.S. 824, 66 L. Ed. 2d 26, 101 S. Ct. 84; *United States v. Ford* (10th Cir. 1975), 525 F.2d 1308; *United States v. DeBerry* (2d Cir. 1973), 487 F.2d 448.) In each of the foregoing cases the facts are similar: a lawful or private search disclosed the presence of contraband in a package about to be shipped to a receiving defendant; State police or Federal agents were called in, who notified police or agents at the package's point of destination; the contents of the package were marked or identified, except in *Bulgier* and *Andrews;* the package was delivered under close surveillance; defendant was arrested shortly after he or she retrieved the package; and the package was thereafter seized and searched. Both *Bulgier* and *Andrews* hold that *Sanders* and *Chadwick* are not applicable in a "controlled delivery" situation, since in neither case was there an initial legitimate search "beyond the commands of the Fourth Amendment." *United States v. Andrews* (10th Cir. 1980), 618 F.2d 646, 651.

The State argues that since the initial airport search in the present case by Customs agents was the functional equivalent of a border search which did not require a warrant or probable cause (*United States v. Ramsey* (1977), 431 U.S. 606, 52 L. Ed. 2d 617, 97 S. Ct. 1972; *United States v. Odland* (7th Cir. 1974), 502 F.2d 148, *cert. denied* (1974), 419 U.S. 1088, 42 L. Ed. 2d 680, 95 S. Ct. 679; *United States v. Washington*), the seizure of the contraband by agent Labek at the Customs depot was also legitimate. Consequently, the State insists, when defendant was arrested, the police merely reasserted control over the container and were not required to secure a warrant before opening the container at the police station. Assuming the initial search by Customs agents was legitimate, the circumstances of the instant case disclose factual departures from the cases cited by the State. In those cases, except in *Bulgier*

and *Andrews,* the contraband was marked,[1] a procedure not followed here. Labek was not present when the table was replaced in the container and the latter was resealed. Further, neither defendant nor his apartment was kept under continuous or close surveillance. Instead of remaining in sight of police prior to his arrest, defendant here had taken the container into his apartment, out of view of authorities. During that same time, neither Labek nor Lipsek remained in the hallway. Instead of retaining dominion and control of the package, as in the "controlled delivery" cases, the authorities here relinquished such control.

Contrary to the State's contention, law enforcement officials were not "absolutely sure" of the contents of the container: Labek could not be absolutely sure of its contents when he delivered it as he was not present when the table was replaced and the container was resealed; he had not marked or otherwise identified it in any way; Lipsek only knew of the container's contents through hearsay; and there is no certainty that the contents of the package were the same before and after the package was brought into defendant's apartment. Given these circumstances, it cannot be said that the officials retained the requisite dominion and control over the container and its contents, which are the essential elements of a controlled delivery. The retrieval of the container in defendant's hallway therefore must be deemed to have constituted a new seizure distinct from the original seizure on February 21. (See *United States v. Edwards* (1st Cir. 1979), 602 F.2d 458, 467, n.9.) The officials may have had probable cause to suspect what was in the container; however, as the United States

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[1] In *Bulgier*, where marking did not occur, the court stated that such identification was not necessary where the container in which the contraband was repackaged was never out of the agent's sight and where it was observed that the defendant had not opened the package up to the moment of arrest. 618 F.2d 472, 474, 478.

Supreme Court has held, probable cause alone does not justify its search. *United States v. Chadwick; Arkansas v. Sanders.*

II

The State next argues that the search at issue was valid as a search of the person and the area within his immediate control incident to a lawful arrest, relying upon *Chimel v. California* (1969), 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, and that such a search, which could have been made at the time of arrest, may also be conducted later when the accused arrives at his place of detention. (*United States v. Edwards* (1974), 415 U.S. 800, 803, 39 L. Ed. 2d 771, 775-76, 94 S. Ct. 1234, 1237 (hereinafter *Edwards*); *People v. Campbell* (1977), 67 Ill. 2d 308, 367 N.E.2d 949.) In *Edwards*, which involved the search of clothes worn by the arrestee while in detention, the Supreme Court held that personal effects in the defendant's possession at the place of detention are subject to search without a warrant because of his reduced expectancy of privacy, due to the arrest, as to such items. In *Campbell*, a search was conducted of two of the defendants' nine pieces of luggage as they were placed under arrest, and all nine were searched later at police headquarters. The Illinois Supreme Court upheld the search, noting "searches and seizures that could be made *** at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*Campbell*, at 319.) The court also observed that the ultimate test is the reasonableness of the search.

The government in *Chadwick* raised a similar argument, that the search of the defendants' footlocker which took place in the Federal building after defendants were taken into custody was justified as a search incident to an arrest. The Supreme Court rejected that argument, stating that where a search is remote in time or place from the arrest, no exigency

exists. When law enforcement officers have reduced the item seized to their exclusive control, thereby eliminating the danger than an arrestee might seize a weapon or destroy evidence, a search of that property is no longer incident to an arrest. (433 U.S. 1, 15, 53 L. Ed. 2d 538, 551, 97 S. Ct. 2476, 2485.) Here also it must be concluded that the officers' search of defendant's container in the police station was no longer incident to his arrest. Having taken control of the container and table upon defendant's arrest, there was no further risk that any evidence or contraband within the container would be destroyed or removed by defendant and no exigent circumstances existed which justified a warrantless search thereof hours later at police headquarters. In footnote 10 of *Chadwick*, the court states, "[u]nlike searches of the person, *** *United States v. Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy ***." (433 U.S. 1, 16 n.10, 53 L. Ed. 2d 538, 551 n.10, 97 S. Ct. 2476, 2486 n.10.) The distinction between the situation described in *Edwards* and that in *Chadwick* was also discussed in *United States v. Berry* (7th Cir. 1977), 560 F.2d 861, *vacated on other grounds* (7th Cir. 1978), 571 F.2d 2, in which the warrantless search of an attache case occurring after the arrest was held improper, following *Chadwick*. The *Berry* court found that by its *Chadwick* decision, the Supreme Court had limited *Edwards* to its own facts. Clearly *Edwards* only applies to personal effects, such as clothing on the person of the accused, and is not controlling here. To be noted is that *People v. Campbell* was decided before the Supreme Court opinions in *Chadwick* and *Sanders* were rendered. The trial court properly suppressed the evidence seized from the container and table in the case *sub judice*.

III

Finally, the State argues that defendant cannot invoke the protection of the Fourth Amendment since the container was abandoned in the hallway. The State contends that Agent Labek had a right to be in the hallway, first, because defendant had invited him there to deliver the package, and second, because the common hallway of a building is not a constitutionally protected area, citing *People v. Carroll* (1973), 12 Ill. App. 3d 869, 876, 299 N.E.2d 134, *cert. denied* (1974), 417 U.S. 972, 41 L. Ed. 2d 1144, 94 S. Ct. 3180. Neither a search nor a seizure was conducted in a common hallway in *Carroll* under circumstances even vaguely analogous to those existing in the present case. It is the privacy interest in the contents of the container, not the privacy interest in the hallway, which is at issue here. As to the former interest, "that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place." *Sanders,* 442 U.S. 753, 766-67, 61 L. Ed. 2d 235, 247, 99 S. Ct. 2586, 2594.

The State also contends that defendant abandoned the container in that he did not take minimal precautions to preserve his privacy rights, citing *People v. Blake* (1981), 93 Ill. App. 3d 538, 417 N.E.2d 682. In *Blake,* the police were found to be justified in searching a bag filled with contraband which was kept in the basement laundry room in an apartment building. The *Blake* court declined to find a reasonable expectation of privacy in that case since the landlord had given permission for the search, the laundry room was not immediately adjacent to the apartment, and the defendant, in storing the contraband in an ordinary paper bag, had failed to make a reasonable attempt to preserve his privacy. The instant case involves a search of a sealed container taken from defendant in a hallway adjacent to his apartment. *Blake* is clearly inapposite. Further, nowhere in the record is it suggested that defendant abandoned the container. To the contrary, Labek

described defendant, prior to his arrest, as standing "in the hallway *with* the container." (Emphasis added.) Also, during the State's cross-examination of Labek, counsel referred to the container as being *with* defendant at the time of his arrest, and was not corrected by Labek.

For the foregoing reasons, the trial court's ruling must be affirmed.

Affirmed.

DOWNING and PERLIN, JJ., concur.

APPENDIX B

FINDINGS OF TRIAL COURT ON MOTION TO SUPPRESS

STATE OF ILLINOIS

SS.

COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF ILLINOIS

V. Information No. 79-2245

JOHN ANDREAS

REPORT OF PROCEEDINGS had in the above entitled case, before the Honorable MARK E. JONES, Judge of the Criminal Division, on the 3rd day of June, A.D., 1980.

APPEARANCES:

HON. BERNARD CAREY,
State's Attorney of Cook County, by

MR. DAVID J. WEINER,
Assistant State's Attorney,

appeared for the People;

MR. PATRICK REARDON and
MR. LAWRENCE SUFFREDIN,

appeared for the Defendant.

* * *

THE COURT: All right. Then the record will, of course, disclose that arguments have been made about a week ago, and I think on the basis of the two cases that you have had — What were the cases?

MR. REARDON: Chadwick and Arkansas versus Sanders.

THE COURT: All right. Determining of the facts, determining the situation in this case. All right. Defendant's Motion Defendant to Suppress — What was it to suppress? The search?

MR. WEINER: No.

MR. REARDON: The Article seized.

MR. WEINER: There was somewhat — I am somewhat familiar with the case. There was, I — I think the argument that was being forwarded was not the search, because I think it was already conceded that the initial search that was made by the Customs People was lawful, but that the subsequent seizure was unlawful. Am I correct on that?

MR. REARDON: For purposes of this motion you are correct, that we have not argued the initial search, but we are arguing that the articles seized as a result —

THE COURT: Is that a Motion to Suppress Evidence?

MR. REARDON: Yes.

THE COURT: Motion to Suppress Evidence is sustained. All right. Now what?

APPENDIX C

ORDER OF THE SUPREME COURT OF ILLINOIS DENYING LEAVE TO APPEAL

ILLINOIS SUPREME COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

Robert H. Gillespy
Clerk

February 2, 1982

Mr. Michael E. Shabat
Asst. State's Attorney
Criminal Appeals Division
Richard J. Daley Center, Rm. 500
Chicago, IL 60602

No. 55781 — People State of Illinois, petitioner, vs. John Andreas, respondent. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Robert H. Gillespy
Clerk of the Supreme Court

Office - Supreme Court, U.S.
FILED
DEC 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District

JOINT APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

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The Opinion of the Illinois Appellate court is reported at 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1st Dist. 1981) and is included in the petition for *certiorari* as Appendix A, at 1a through 12a.

The Circuit Court's ruling appears in the petition for *certiorari* as Appendix B, at 1b through 2b.

The order of the Illinois Supreme Court of February 2, 1982, denying petitioner's petition for leave to appeal appears in the petition for *certiorari* as Appendix C, at 1c.

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 16, 1979—
Information filed in the Circuit Court of Cook County, Illinois.

March 6, 1980—
Respondent's Motion to Suppress Evidence filed.

March 6, 1980—
Respondent's Motion to Quash Arrest and Suppress Evidence filed.

June 3, 1980—
Order of the Honorable Mark E. Jones granting respondent's Motion to Suppress Evidence.

July 3, 1980—
Notice of Appeal filed.

September 15, 1981—
Opinion of the Appellate Court of Illinois, First Judicial District.

February 2, 1982—
Petitioner's petition for leave to appeal denied by the Illinois Supreme Court.

[74]

STATE OF ILLINOIS
COUNTY OF COOK—SS.

THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS
v.
JOHN ANDREAS

Info. No. 79 2245

INFORMATION

THE PEOPLE OF THE STATE OF ILLINOIS represented by the State's Attorney of Cook County, do hereby inform and charge that against the peace and dignity of the People of the State of Illinois and in violation of the laws of the State of Illinois the herein named defendant(s) contrary to the 1977 Illinois Revised Statutes as amended did violate said laws of Illinois as described herein.

[75]

(Count No. 1)

The State's Attorney of Cook County now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that on February 22nd, 1979 in Cook County, Illinois John Andreas committed the offense of Possession of Cannabis in that he, knowingly and unlawfully possessed and had under his control, otherwise than as authorized in the Cannabis Control Act of said State of Illinois then in force and effect, a quantity more than five hundred grams of cannabis sativa, sometimes called marijuana, In violation of Chapter 56½ Section 704(e) Illinois Revised Statutes and against the peace and dignity of the People of the State of Illinois.

[76]

(Count No. 2)

The State's Attorney of Cook County now appears before the Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that on February 22nd, 1979 in Cook County, Illinois John Andreas committed the offense of possession of Cannabis with intent to deliver in that he, knowingly and unlawfully possessed with intent to deliver otherwise than as authorized in the Cannabis Control Act of said State of Illinois then in force and effect a quantity more than five hundred grams of cannabis sativa sometimes called marijuana, In violation of Chapter 56½ Section 705(e) Illinois Revised Statutes and against the peace and dignity of the People of the State of Illinois.

[77]

STATE OF ILLINOIS

COUNTY OF COOK—SS.

THE PEOPLE OF THE STATE OF ILLINOIS by the State's Attorney of Cook County, through his Assistant State's Attorney, after first being duly sworn on his oath, deposes and swears that the foregoing 2 count(s) in this information has/have been read and subscribed by him as evidenced by his signature below and that the same in each count hereby incorporated is true.

/s/ Signature Illegible
Assistant State's Attorney

Subscribed and sworn to before me April 16th, 1979.

/s/ VIRGINIA L. GLASS
Judge, Clerk, or Notary

The bail is fixed at _____

JUDGE: _____
Enter

[91]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 79-2245
JOHN ANDREAS,	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE

(Filed March 6, 1980)

Defendant, JOHN ANDREAS, through his attorneys, Patrick G. Reardon, and Lawrence J. Suffredin, Jr., moves this Court to suppress evidence seized by law enforcement officers in violation of defendant's rights. In support of his motion defendant states as follows:

1. Defendant was arrested at 61 E. Goethe, Chicago, Illinois, on February 22, 1979.

2. At the time of the said arrest, law enforcement officers seized a closed steel shipping container which was sealed at the time of the seizure.

3. The said sealed container was taken by law enforcement officers to the Chicago Police Station at 1121 S. State, Chicago, Illinois.

4. The said container was seized without a warrant.

5. After seizing and transporting the sealed metal container to the police station, law enforcement agents opened the container and seized the contents.

6. The opening of the container and the seizure of its contents was done without a warrant.

[92]

7. One of the contents alleged to have been seized from within the container was a circular table of solid wood approximately three to three and a half feet in diameter with a thickness of seven to eight inches with a heavy cover of lacquer on it.

8. After seizing the table from within the container police agents destroyed the said table by opening it up and allegedly seizing from inside it a quantity of marijuana.

9. The opening and damaging said table and the seizure of the alleged contents was done without a warrant.

10. The prosecution has indicated to the defendant that it plans to use the package and the contents of the said table as evidence against him at trial.

11. The seizure of the container, the opening, damaging, and seizure of its contents was a violation of defendants rights under the United States Constitution, Amendment IV, and the Illinois Constitution, Article I, Section 6.

WHEREFORE, defendant, JOHN ANDREAS, moves this Court to enter an order prohibiting the prosecution from introducing the sealed container or any of its contents as evidence at trial or making any reference thereto at trial in the above captioned case.

Respectfully submitted,

/s/ PATRICK G. REARDON
PATRICK G. REARDON
LAWRENCE J. SUFFREDIN, JR.
Attorneys for John Andreas
221 North LaSalle Street, -1938
Chicago, Illinois 60601
(312) 372-5716

[94]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	No. 79-2245
JOHN ANDREAS, Defendant.	)	

MOTION TO QUASH ARREST AND SUPPRESS EVIDENCE

(Filed March 6, 1980)

Defendant, JOHN ANDREAS, through his attorneys, Patrick G. Reardon, and Lawrence J. Suffredin, Jr., moves this Court to quash his arrest and suppress all evidence seized as a result of that arrest. In support of his motion he states as follows:

1. Defendant was arrested at 61 E. Goethe, Chicago, Illinois, on February 22, 1979, at approximately 5:30 P.M.

2. At the time of his arrest defendant was shown no warrant for his arrest or for the search of his person or the premises.

3. At the time of his arrest defendant was doing no act which would give rise to a conclusion of probable cause that he was committing or had committed an offense.

4. At the time of his arrest, certain items were seized by the arresting officers.

5. In particular, a sealed container alleged to contain a quantity of marijuana was among the items seized.

[95]

6. Defendant has been informed that the seized items will be used against him at trial in the above-captioned case.

7. The arrest and seizure described herein were in violation of defendant's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and under the Constitution of the State of Illinois, Article I, Sections 1, 2, 6, and 10.

WHEREFORE, defendant, JOHN ANDREAS, moves this Court to enter an order quashing his illegal arrest and suppressing all evidence seized as a result thereof.

Respectfully submitted,

/s/ PATRICK G. REARDON
PATRICK G. REARDON
LAWRENCE J. SUFFREDIN, JR.
Attorneys for John Andreas
221 North LaSalle Street
Suite 1938
Chicago, Illinois 60601
(312) 372-5716

[1]

IN THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

JOHN ANDRESS, Petitioner,	)	
vs.	)	No. 79-I-2245
THE PEOPLE OF THE STATE OF ILLINOIS, Respondent.	)	Charge: Possession of a Controlled Substance

MOTION TO SUPPRESS EVIDENCE

REPORT OF PROCEEDINGS of the hearing before the Honorable MARK E. JONES, on the 22nd day of May, 1980.

APPEARANCES:

MR. LAWRENCE SUFFREDIN,
MR. PATRICK REARDON,
on behalf of the Petitioner.

HONORABLE BERNARD CAREY
State's Attorney of Cook County, by
MR. KEVIN SWEENEY,
Assistant State's Attorney,
on behalf of the Respondent.

[21]

* * *

Q. Now, at the time that you delivered a package to the Goethe address, were you in possession of a search warrant for that package?

[22]

A. No, sir.

Q. Were you in possession of an arrest warrant for John Andress?

A. No, sir.

Q. During the half hour to 45 minutes that you stayed in the hall, was Officer Lipsek with you that entire time?

A. I was not in the hallway for the entire 30 to 45 minutes.

Q. Where were you during that 30 to 45 minutes?

A. Do you want me to answer your first question first or answer your second question?

Q. Second question first. Where were you during that 30 to 45 minutes?

A. Part of the time I was in the hall and the rest of the time I was in the building.

Q. Were you on the same floor as the Andress apartment when you were in the building?

A. No, sir.

Q. So that you did not have the Andress apartment under personal surveillance during that 30 to 45 minutes yourself?

A. That's correct.

Q. Do you know what happened to Officer Lipsek after you delivered the package?

[23]

A. I know now, but I didn't know at that time.

Q. What if anything did Officer Lipsek do during that period of time?

A. He exited the building.

Q. And do you know where he was going when he exited the building?

A. At that time or now?

Q. Now, sir?
A. Yes. Yes, sir, I do.
Q. Where was he going?
A. He was going to get a state search warrant.
Q. At the time that Mr. Andress was arrested, were you or any of the officers in possession of either a state or a federal court search warrant for the package?
A. To the best of my knowledge, no, sir.
Q. Were you or any of the other officers in possession of either a state or federal search warrant for John Andress?
A. To the best of my knowledge, no, sir.
Q. Are you aware of any warrant for the search of the container ever being issued by a state or federal judge on February 22, 1979?
A. I'm aware that none was issued.

[24]

MR. SUFFREDIN: Just a moment, your Honor.
(Brief pause.)
MR. SUFFREDIN: No further questions, your Honor. Thank you.

CROSS EXAMINATION BY MR. SWEENEY:

Q. Sir, you testified that on the 22nd of February, 1979, you were given some information concerning a certain container in the possession of United States Customs Service, is that correct?
A. In reviewing Defendant's Exhibit Number 1 which is a carbon copy of special agent Thomas Thompson's report, I testified to receiving the information on February 22nd, but his report indicates that we in fact received the information on February 21st.
Q. Okay. Now where did you personally—from whom did you personally receive that information?
A. I was in a telephone conversation with either Inspector Thomas McDonald or John Micklecki of the U.S. Customs Agency.
Q. And what did they advise you, if anything, concerning this container?
A. That they had removed a table from a container that had been shipped from India. And upon removal of the

[25]

table and drilling of same, that they had removed a black substance which received a positive reaction—after field testing, a positive reaction for the presence of marijuana.

Q. I see. Now subsequently, did you proceed to inspect that container yourself?

A. No, sir.

Q. Well, you had occasion to see it the following day, is that correct?

A. To see the container, yes, sir, I did.

Q. Where was it when you first saw it?

A. It was in the custody of the U.S. Customs Agency.

Q. Where is that physically?

A. In their warehouse where I had first observed it the previous day.

Q. I see. Did you have occasion to perform any test yourself with respect to the container and its contents?

A. On the 21st of February, 1979, yes, sir, I did.

Q. Could you describe what test you performed and on what?

A. It was a marquis test in which—it's a plastic capsule; contains chemicals. I removed the top, placed some of the black substance inside; put the top of the

[26]

capsule back on. I pinched it breaking a container, a little tubular container inside, which released the chemicals. I shook it and after approximately 30 seconds, it changed to a certain color.

If it changes to that certain color, then that is an indication of a positive reaction for the presence of marijuana.

Q. Now, could you describe the container as you observed it when you first inspected it?

A. When I first observed it?

Q. When you first observed it?

A. Yes, sir, it was a metal container, I believe it was aluminum, approximately four foot square; approximately ten inches in depth. The top of it had been removed and a table that—I was advised that the U.S. Customs Inspectors had removed this table from that container.

Q. Did you have occasion to see the table at that time?
A. Yes, sir, I did.
Q. Could you describe the table?
A. It was a round table, dark in color, a dark reddish or a brownish wood. It was approximately seven inches in thickness. It had a heavy coating of lacquer all over the top of it and it gave off just a very deep shine.

[27]

Q. I see. Now, you had occasion to see that container again on February 22nd, is that correct?
A. Yes, sir, I did.
Q. And had it been resealed at that time?
A. At the time I observed it, it was resealed, yes, sir.
Q. Now, you testified that you took that container to an address on what, is it 61 East Goethe? Is that correct?
A. East Goethe, Chicago, Illinois.
Q. At that time you testified that you and Investigator Lipsek posed as delivery men and delivered it to John Andress, is that correct?
A. Yes, sir.
Q. And you observed—and you further testified that you observed the defendant take it in the apartment, is that correct?
A. Yes, sir.
Q. Now, did you have any conversations with John Andress or did any conversations with John Andress take place in your presence at the time you delivered it?
A. Yes, sir.
MR. REARDON: Objection, Judge, irrelevant.

[28]

MR. SWEENEY: Your Honor, counsel is contending or is apparently contending there was no probable cause to arrest John Andress. Therefore what John Andress said at the time it was delivered is relevant.
THE COURT: Objection is overruled, you may answer. What was the answer?
MR. SWEENEY: The answer was yes.
THE COURT: What was the question?
MR. SWEENEY: The question was whether this officer engaged in any conversation with John Andress or was

present in any such conversation at the time the package was delivered.

THE COURT: All right.

MR. SWEENEY: Q. Okay. And who was present in the course of that conversation or conversations?

A. I and John Andress was present during part of the conversation and Officer Lipsek, myself and John Andress was present during other parts of the conversation.

Q. I see. And where did this conversation take place?

A. The first part of the conversation took place in the lobby of the apartment building between myself and Mr. Andress.

Q. And where did the second part take place?

[29]

A. It took place outside the apartment building between the apartment building, the van, and back inside the apartment building.

Q. Okay. Would you relate to the Court who said what to whom during the first part of the conversation?

A. Yes, sir.

Q. Please do.

A. When I first entered the apartment building I was met—I met a security lady behind a wall and advised her that I was a delivery man and I had a package for Mr. Andress. Minutes later a subject appeared in the lobby of the apartment building at which time I asked him if he was in fact Mr. John Andress which he stated that he was.

Q. And was that the same Mr. John Andress who is present in court today?

A. He is the same Mr. Andress that is sitting at the end of counsel table with the glasses on. Okay. And he has a tan and yellow shirt and, I guess, an off-reddish jacket. He is on the right-hand side of counsel.

Q. Identifying the defendant for the record.

And did you have a conversation with Mr. Andress at that time?

A. Pardon me?

[30]

Q. And did you have a conversation with Mr. Andress at that time?

A. Yes, sir.

Q. And what did you say to him and what did he say to you?

A. I stated that I was a delivery man and that I had a package for him. At that time he stated, "Good. Where is it?"

I told him it was out in the van and he stated that he'd help me carry it in. I told him that I had another delivery man with me outside and that we would be glad to bring the package wherever he would like it delivered.

Q. I see. And what happened then?

A. We walked outside the apartment building; met Officer Lipsek at which time we walked to the van. We opened up the rear doors; began to remove the container at which time Officer Lipsek stated that it was very heavy.

Mr. Andress stated that it wasn't that heavy, that he had packaged it himself, that it only contained a table. And we then removed the—well, simultaneously we were removing the package from the van.

We then carried it into the apartment building, put it on the elevator and went up to the second floor.

[31]

Q. Okay. Did any further conversation take place on the second floor?

A. Yes, sir.

Q. And what was said at that point?

A. Mr. Andress advised us to carry it down to his apartment and to lay it in the hallway right outside his apartment door.

Q. I see. And you testified that later you observed Mr. Andress carry or pull that package into his apartment?

A. I observed Mr. Andress pull it into his apartment.

Q. I see. Now later you testified that you were present at the arrest of Mr. Andress some half hour to 45 minutes later approximately, is that correct?

A. Approximately, yes, sir.

Q. And could you describe—was that the next time you saw Mr. Andress after you saw him pulling the package into his apartment?

A. No, sir.

Q. I see. When had you seen him between the time he had pulled the package into his apartment and the time he was placed under arrest?

A. Approximately five minutes after he pulled this package into the apartment I was conducting surveillance of the hallway in which his apartment door opened. I observed

[32]

Mr. Andress to exit his apartment door and then walk to a—I believe it was either a doorway or a window that was at the end of the hallway which was closest to his apartment door. I observed him to look outside; looked in both directions and looked downward and then turned around and re-entered his apartment.

Q. I see. Now when—could you describe where you observed him; what he was doing the next time you had occasion to see Mr. Andress?

A. He was in the hallway with the container outside of the hall.

Q. And what if anything was he doing with the container?

A. When I observed him, he wasn't doing anything with the container.

Q. I see. And at that time was he placed under arrest?

A. Yes, sir.

Q. I see. Now was that container that he had with him at the time he was placed under arrest the same container you delivered to him earlier?

A. Yes, sir, it was.

Q. Okay. I have no further questions at this time.

* * *

[58]

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS	)	
V	)	Information No. 79-2245
JOHN ANDRESS	)	

REPORT OF PROCEEDINGS had in the above entitled cause, before the Honorable MARK E. JONES, Judge of the Criminal Division, on the 3rd day of June, A.D., 1980.

APPEARANCES:

HON. BERNARD CAREY,
State's Attorney of Cook County, by
MR. DAVID J. WEINER,
Assistant State's Attorney,
appeared for the People;

MR. PATRICK REARDON and
MR. LAWRENCE SUFFREDIN,
appeared for the Defendant.

[60]

* * *

MR. SUFFREDIN: As Your Honor is well aware, we heard testimony on this case approximately two weeks

ago, and at that time we began arguments on the motion and the State requested an opportunity to file written briefs. We set a briefing schedule in which briefs were to be filed with the Court approximately five days later.

At that time we filed our brief and the State filed no brief. We then had further argument on that date, and the State was unable to distinguish any of the cases we had given them in the written brief, and the State asked for additional time to see if they could find cases to distinguish those. And that's why we set this specifically for one thirty in the afternoon on this date, to be able to do that.

MR. WEINER: Judge, the bailiff just advised me there is a call for me right now. That may be—

[61]

THE COURT: All right. Go take the call.

(Pause)

MR. WEINER: It was, indeed, my office calling me, my associate, Mr. Sikes, concerning my inquiry about this particular case, and it is his impression that Mr. Sweeney was under the belief that all arguments had been made in this matter and that Your Honor was to rule on it, and that is the purpose for us being here.

THE COURT: All right.

MR. WEINER: That is the only representation that I can make to the Court, and that is the only representation I intend to make to the Court.

THE COURT: All right. Then the record will, of course, disclose that arguments have been made about a week ago, and I think on the basis of the two cases that you have had—What were the cases?

MR. REARDON: Chadwick and Arkansas versus Sanders.

THE COURT: All right. Determining of the facts, determining the situation in this case. All right. So that's Motion Defendant to Suppress—What was it to suppress? The search?

MR. WEINER: No.

MR. REARDON: The article seized.

[62]

MR. WEINER: There was somewhat—I am somewhat familiar with the case. There was, I—I think the argument that was being forwarded was not the search, because I think it was already conceded that the initial search that was made by the Customs People was lawful, but that the subsequent seizure was unlawful. Am I correct on that?

MR. REARDON: For purposes of this motion you are correct, that we have not argued the initial search, but we are arguing that the articles seized as a result—

THE COURT: Is that a Motion to Suppress Evidence?

MR. REARDON: Yes.

THE COURT: Motion to Suppress Evidence is sustained. All right. Now what?

* * *

[98]

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellant	Indictment No. 79 I 2245
VS	
JOHN ANDREAS Defendant-Appellee	Honorable MARK JONES Trial Judge

NOTICE OF APPEAL

(Filed July 3, 1980)

An appeal is taken from the order or judgment described below:

1. Court to which appeal is taken: Appellate Court of Illinois—1st Dist.

2. Name of Appellee's Attorney and address to which notices shall be sent:

Name: Patrick G. Reardon

Address: 221 N. LaSalle St., Rm. 1938, Chicago, Ill. 60601.

If Appellant is indigent and has no attorney; does he want one appointed? _____.

3. Name and address of Appellant's Attorney on Appeal:

Name: State's Attorney of Cook County

Address: 574 Daley Center, Chicago, Ill. 60602

Phone: 443-5496

4. Date of Judgment or Order: June 3, 1980

5. Appeal is taken from: Order of Court surppressing evidence.

/s/ KEVIN SWEENEY
Assistant State's Attorney

Notice filed
Dated: July 3, 1980
Appeal Check Date _____

MEMORANDUM OF ORDERS
(Circuit Court Of Cook County, Illinois)

THE PEOPLE OF THE STATE OF ILLINOIS

CASE NO.

v.

John Contreras et al

MEMORANDUM OF ORDERS

79 C 2245

DATE	JUDGE	ORDERS ENTERED	DATE	JUDGE	ORDERS ENTERED
2-27	Lynch J.D.	atty Abraham files appr	7-2-79	Jones	PP Mot 7-19 V
			9-7-79	Jones	PP Mot 10-9-79 nd
		DEFENDANT KNIGHT, WAIVES [illegible] OF JUDICIAL	NO		
		[illegible] COURT [illegible]	10-9-79	Jones	PP Mot 11-7-79
		[illegible] 10-5-79	11-7-79	Jones	PP Mot 11-26-79 V Def appr w.p.
		[illegible]			
	16	Special Felony Clerk's Office Rm 606	12-79	Jones	PP Mot 12-27-79 " " "
		for visit of Judges to Judge			
		Daniel J. Kubasiak Judge Dec.	12-11-79	Jones	PP MD 1-28-80
FEB 17 1979		PT State Pet Conv to Class			
		Cls Present - Written Petition Defendant for substitution of judge; Hon. Judge D. White [illegible] J. Hirsch, and [illegible] Jr. It is ordered by this Court, cause transferred to Chief Justice for re-assignment. See Written Petition in file.	3-6-80	Jones	PP MD Motion Conv to Class. ord. for MD Motion Mot p. Add. Conv ord. for MD Motion to Suppress granted ord. for MD Motion to allow impeachment ord. for MD Motion to Quash Arrest & Suppress evidence ord. for PP Mot 4-18 Nd
MAR 17 1980		ORDER OF COURT CAUSE ASSIGNED TO JUDGE [illegible] FOR June 11, 1980			
5-11-80	Jones	PP MD Motion order ord for Attorney Bar 7-2-79 V	5-22-80	Jones	PP MD Motion to Suppress Conv to Class ord for Mot 8-20-80 nd
6-5					

ORDERS

DATE	JUDGE	ORDERS ENTERED
5 29 80	JWW	P.T. MJG - 3 pp (Mail to Counsel)
6 3 80	JWW	P/M/D, Motion to suppress evidence by Govt. Ruling of Court Motion to Suppress evidence MJG 6-18-80
6 11 80	JWW	PP MJG 7-11-80
7 11 80	JWW	PP Ole appeal checklist 8-1-80
		DATE 7-3-80 NOTICE OF APPEAL FILED
		DATE 7-25-80 NOTICE OF NOTICE MAILED
10-22-1980	Clerk	TRANSCRIPT OF PROCEEDINGS RECEIVED AND FILED IN CLERK'S OFFICE 1-Vol Motion to Suppress Evidence before the Honorable Mark E. Jones on May 29 1980
10-22-1980	Clerk	TRANSCRIPT OF PROCEEDINGS RECEIVED AND FILED IN CLERK'S OFFICE 1-Vol. Before the Honorable Mark E. Jones on May 29, 1980
10-22-1980	Clerk	TRANSCRIPT OF PROCEEDINGS RECEIVED AND FILED IN CLERK'S OFFICE 1-Vol. Before the Honorable Mark E. Jones on the Third Day of June 1980

MEMORANDUM OF ORDERS
(Circuit Court Of Cook County, Illinois)

THE PEOPLE OF THE STATE OF ILLINOIS

v.

John Whitten

77 2345

MEMORANDUM OF ORDERS

DATE	JUDGE	ORDERS ENTERED	DATE	JUDGE	ORDERS ENTERED
4-5-11	Linn	Def. by Bob Reynolds & Atty			
		Record.			
			6 chs		

Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The warrantless opening by police of John Andreas' sealed container, and the warrantless cracking open of the solid wood table top within, were violations of his Fourth Amendment rights and rendered the contents inadmissible at trial, where the police had seized the sealed container, taken it to a protected location, and there were no exigent circumstances.

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In The

Supreme Court of the United States

October Term, 1981

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, JOHN ANDREAS, respectfully prays that the Petition for a Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First Judicial District, entered on September 15, 1981, be denied.

JURISDICTION

Petitioner adequately sets forth the jurisdiction of this Court.

STATEMENT OF THE CASE

On February 22, 1979, police officers seized a closed, sealed container from John Andreas. (Tr. 17) John Andreas was arrested in the building hallway outside the door of his apartment. (Tr. 17) The container was seized at that same location at that time. (Tr. 17) The container was taken in its closed, sealed condition to police headquarters. It was later opened by police outside the presence of John Andreas. (Tr. 36) The container had two locks affixed to hinges. (Tr. 42) It was not possible to see into the container when it was closed. (Tr. 35) The police had no warrant for the search of the container. (Tr. 36)

Evidence was introduced that customs agents had searched a container on February 21, 1979, at O'Hare Airport. (Tr. 41-42) Contraband was discovered in that package. (Tr. 43) Police agents Labek and Lipsek delivered a sealed container of the same description to the apartment of John Andreas on February 22, 1979. Neither officer had been present when that package had been sealed at the airport. They left the container with John Andreas in the hallway in front of his apartment door. (Tr. 16) Officer Labek saw John Andreas pull the container into his apartment. They then left the vicinity of the hallway. (Tr. 22) John Andreas was arrested in that hallway some 30 to 45 minutes later. (Tr. 16-17) It was at that time that the seizure of the container occurred. The apartment was not under surveillance during the 30 to 45 minute period. (Tr. 22, 38) It was after this seizure that the container was transported to the police and eventually opened. Contraband was allegedly discovered. (Tr. 37)

Contrary to representations in the petitioner's statement of the case, the State did not prove that Inspector Drozek arranged for a "controlled delivery" of the container. The Illinois Appellate Court specifically found that no "controlled delivery" had taken place.

Contrary to representations in the petitioner's statement of the case, Agent Labek did not maintain surveillance on respondent's apartment. The Illinois Appellate Court specifically found that neither defendant nor his apartment was kept under continuous or close surveillance.

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT CORRECTLY APPLIED BOTH STATE AND FEDERAL LAW AS TO WARRANTLESS SEARCHES AND SEIZURES AFTER REJECTING THE FACTUAL CONTENTION THAT THERE HAD BEEN A "CONTROLLED DELIVERY."

The Illinois Appellate Court ruled that the law controlling the warrantless search in this case is expressed in the cases of *United States v. Chadwick*, (1977) 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476, and *Arkansas v. Sanders*, (1979) 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586, as well as a number of Illinois opinions: *People v. Hamilton*, (1979) 74 Ill. 2d 457, 386 N.E. 2d 53; *People v. Redmond*, (1979) 73 Ill. App. 3d 160, 390 N.E. 2d 1364; *People v. Vogel*, (1973) 58 Ill. App. 3d 910, 374 N.E. 2d 1152; *People v. VonHatton*, (1977) 52 Ill. App. 3d 338, 367 N.E. 2d 566.

The prosecution contended in the Appellate Court that the warrantless search of the container was justified

because the container had already been searched a day or two earlier by a customs agent at O'Hare Airport. For purposes of argument, the parties and the Court assumed that the earlier customs search was proper. The prosecution contended that the police made a so-called "controlled delivery" of the container. The Appellate Court entertained this contention and specifically ruled that the facts did not support the contention that a "controlled delivery" occurred.

> "Instead of retaining dominion and control of the package as in the 'controlled delivery' cases, the authorities here relinquished such control." (Appellate Court Opinion; see Petitioner's Appendix, page 8a).

Thus the issue decided by the Illinois Court was a factual issue, not a legal issue. The petitioner here begs the question and misleads this Court by redeciding this factual question contrary to the conclusion of the Illinois Court. The incorrect factual starting point has caused the petitioner to erroneously frame the legal issue presented to this Court. Contrary to petitioner's contention, the Illinois Appellate Court has not rejected the reasoning and holdings of the Seventh and Tenth Circuit Courts. (Petition, page 4). In fact, the Court considered each of the cited cases in detail and found them inapposite, since there had been no "controlled delivery." (Appellate Court Opinion, Petitioner's Appendix, pages 6a and 7a)

This Court has stated that issues which are primarily factual do not, by themselves, normally justify the exercise of certiorari jurisdiction. *Tacon v. Arizona*, (1973) 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998. Where factual issues have been raised this Court has normally applied a standard of "not clearly erroneous" to a lower

court's findings. *Roemer v. Maryland Public Works Board*, (1976) 426 U.S. 736, 49 L. Ed. 2d 179, 96 S. Ct. 2337; *United States v. General Dynamics Corporation*, (1974) 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186.

The facts presented in the trial court clearly supported the finding that police authorities had relinquished control of the container after the original customs search. Officer Kenneth Labek said that after the container was delivered, Mr. Andreas pulled it into the apartment out of Labek's view. He did not see any container after that for at least a half hour. Labek was asked:

> "Q. So that you did not have the Andreas apartment under personal surveillance during that 30 to 45 minutes yourself?
> A. That's correct." (Tr. 22)

Labek said the other officer left the building. (Tr. 23) Officer Lipsek confirmed this:

> "Q. Now after you delivered the metal container, did you have occasion to leave the location?
> A. Yes, I did." (Tr. 38)

The issue properly decided by the lower courts was a factual one. Based on the evidence presented, it cannot be said that the Illinois Appellate Court was clearly erroneous in upholding the trial judge's determination that no controlled delivery occurred. The petition for certiorari in this case should be denied.

CONCLUSION

It is respectfully submitted that the petitioner has failed to demonstrate special and important reasons for issuance of a writ to a state court of appeals. The decision of the Illinois Court of Appeals correctly applies both Federal and Illinois law wholly consistent with previous decisions of this Court. For the above reasons respondent respectfully submits that the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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June 23, 1982

No. 81-1843

Office - Supreme Court, U.S.
FILED
DEC 13 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District

BRIEF FOR PETITIONER

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

QUESTION PRESENTED

Whether the respondent consignee had any fourth amendment interest in a package containing contraband which had been seized and examined during a lawful customs inspection, thereafter delivered to respondent at his apartment by law enforcement officials under controlled conditions, and then retaken by them from respondent after he moved the package from inside his apartment into the hallway of his apartment building.

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ARGUMENT:

RESPONDENT HAD NO PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE CONTAINING CONTRABAND THAT HAD BEEN SEIZED AND EXAMINED DURING A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO RESPONDENT BY LAW ENFORCEMENT AGENTS UNDER CONTROLLED CONDITIONS, AND THEN RETAKEN BY THEM FROM RESPONDENT AFTER HE MOVED THE PACKAGE FROM INSIDE HIS APARTMENT INTO THE HALLWAY OF HIS APARTMENT BUILDING 7

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In The

Supreme Court of the United States

October Term, 1981

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 100 Ill. App. 3d 396, 426 N.E.2d 1078 (1st Dist. 1981), and is reproduced in the Appendix to the petition for *certiorari* at 1a. The ruling of the trial court on respondent's motion to suppress evidence is not reported, and is reproduced in the Appendix to the petition for *certiorari* at 1b. The order of the Illinois Supreme Court of February 2, 1982, denying petitioner's petition for leave to appeal is reported at 88 Ill. 2d 20 (1982), and appears in the petition for *certiorari* at 1c.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on September 15, 1981. A timely petition for leave to appeal was denied by the Illinois Supreme Court on February 2, 1982. 88 Ill. 2d 20 (1982). That order appears in the Appendix to the petition for *certiorari* at 1c. The petition for a writ of *certiorari* was filed on April 3, 1982, and was granted on October 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Customs Examination and Controlled Delivery

On the morning of February 21, 1979, Ronald Drozek, a United States Customs Inspector, was assigned to the Lufthansa cargo facility at O'Hare Airport, Chicago, Illinois. (Tr. 41) Pursuant to his duties as a customs official, Inspector Drozek reviewed documents pertaining to a package which had been shipped from Calcutta, India, and was consigned to respondent at 61 East Goethe Street, Chicago, Illinois. (Tr. 41-42) After reviewing the documents, he decided to examine the contents of the 4 feet long, 4 feet wide, 1½ feet thick sheet metal package. (Tr. 26, 35, 42)

Inspector Drozek opened the package with keys attached to the airline documents and found a table top approximately 3 feet in diameter and 8 to 10 inches thick. (Tr. 4, 26, 43) After drilling into the table, he discovered a substance which field tested positive for marijuana. (Tr. 4-5, 43) He then contacted Drug Enforce-

ment Administration (DEA) agents who confirmed that the substance being smuggled into the United States in the package was marijuana. (Tr. 25-26) Inspector Drozek and the DEA agents then arranged for a controlled delivery to respondent of the package containing the contraband. (Tr. 13-14)

The following day, February 22, 1979, DEA Agent Kenneth Labek and Chicago Police Officer Wayne Lipsek received the resealed package containing the contraband from customs officials and transported it to respondent's apartment building at 61 East Goethe Street. (Tr. 13-16, 25-26) Posing as delivery men, they entered the building and advised building security personnel that they had a package for respondent. (Tr. 29) Within minutes respondent appeared and identified himself as John Andreas, the consignee of the package. (Tr. 29, 41-42)

Agent Labek, Officer Lipsek, and respondent then walked outside and removed the package from a delivery van. (Tr. 30) Officer Lipsek stated that the package was very heavy. (Tr. 30) Respondent replied, "that it wasn't very heavy, that he had packaged it himself, that it only contained a table." (Tr. 30) Agent Labek and Officer Lipsek then carried the package to the second floor hallway and, at respondent's request, left it outside his apartment door. (Tr. 30-31)

Officer Lipsek then left to obtain a State search warrant while Agent Labek remained in the building to maintain surveillance. (Tr. 31) Agent Labek then observed respondent pull the package into his apartment. (Tr. 31) Shortly thereafter, Agent Labek saw respondent leave his apartment and walk to a window at the end of the hallway. (Tr. 31) Respondent looked downward at the street and then reentered his apartment. (Tr. 31) Approximately thirty to forty-five minutes later,

Agent Labek, who had maintained surveillance within respondent's building, observed respondent in the hallway with the package. (Tr. 31-32, 37-38) He placed respondent under arrest and reasserted control over the package. (Tr. 17, 32) Officer Lipsek was called on the radio and was told to disregard the warrant because respondent had already been arrested. (Tr. 38)

Agent Labek then transported the package, which had been previously searched and then delivered to respondent, to Chicago Police Headquarters at 1121 South State Street where the package was reopened and the table removed. (Tr. 18, 35-37, 39) The table was then reopened and the marijuana which had been previously uncovered by Customs Inspector Drozek was recovered and inventoried. (Tr. 37, 68) The marijuana had a street value of $100,000.00. (Tr. 68)

Rulings on Motion to Suppress

Prior to trial, respondent moved to suppress the marijuana. He alleged that the reopening of the package violated his rights under the fourth amendment to the United States Constitution. (Tr. 91-92) Petitioner asserted that because the package in which the contraband had been secreted was lawfully searched during a proper customs inspection and was thereafter delivered to respondent under controlled conditions, the respondent had no legitimate expectation of privacy in the package or its contents and consequently the reopening of the package was absolutely lawful. The trial court, believing that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), necessitated the obtaining of a search warrant for the reopening of a package following a lawful search and controlled delivery, suppressed the evidence. (Tr. 61-62)

On appeal to the Appellate Court of Illinois, petitioner again asserted that after the smuggled contraband had been discovered during a lawful customs inspection, respondent had no reasonable expectation of privacy in the package. In support of that argument, petitioner noted that the decisions in *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980), and *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980), had held that the subsequent reopening of the package was merely a reassertion of control over the package because it had previously been the subject of a lawful search and a controlled delivery. The Illinois Appellate Court, rejecting the reasoning and holdings of the Seventh and Tenth Circuit Courts of Appeal, held that because the contraband had not been seized at the customs check point, respondent's fourth amendment rights were violated when the package was reopened after the controlled delivery.

Petitioner's subsequent petition for leave to appeal was denied by the Illinois Supreme Court. Petitioner now appeals to this Court from the Illinois Appellate Court holding which granted respondent a protected fourth amendment interest in a package that had been seized and searched during a lawful customs inspection and then delivered to him under controlled conditions.

SUMMARY OF ARGUMENT

Petitioner, the State of Illinois, respectfully submits that no warrant was required to reopen a package containing contraband that had been previously seized and examined during a lawful customs inspection and then delivered to respondent under controlled conditions. The respondent had no legitimate expectation of privacy in the contents of the package because any package shipped across the border is subject to being "searched at random." *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982). The package in the case at bar, was properly searched by a customs inspector as it crossed the border and was thereafter delivered to respondent at his apartment under controlled conditions by law enforcement officers. One officer then maintained surveillance in respondent's building. Approximately thirty to forty-five minutes later, after respondent pushed the package into the hallway of the building, the officer arrested respondent and reasserted control over the package.

The subsequent reopening of the package by law enforcement officials violated no right of respondent protected by the fourth amendment because respondent did not have a legitimate expectation of privacy in the package. Indeed, as recognized by the majority of courts to address this precise issue, the subsequent reopening of a package that has already been lawfully searched and then delivered under controlled conditions is merely the reassertion of control over the package, a reassertion that does not implicate the fourth amendment.

ARGUMENT

RESPONDENT HAD NO PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE CONTAINING CONTRABAND THAT HAD BEEN SEIZED AND EXAMINED DURING A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO RESPONDENT BY LAW ENFORCEMENT AGENTS UNDER CONTROLLED CONDITIONS, AND THEN RETAKEN BY THEM FROM RESPONDENT AFTER HE MOVED THE PACKAGE FROM INSIDE HIS APARTMENT INTO THE HALLWAY OF HIS APARTMENT BUILDING.

The respondent consignee of a package containing contraband that had been previously seized and examined during a lawful customs inspection and then delivered to respondent under controlled conditions has no legitimate expectation of privacy in that package. As recognized by the majority of courts to address this precise issue, because the recipient has no rights in the package which were protected by the fourth amendment no warrant is required to justify the subsequent retaking and reopening of the package. Indeed, the subsequent retaking and reopening of the package by law enforcement officials after the controlled delivery is merely the reassertion of actual physical control over the package.

During the course of a lawful customs inspection at the Lufthansa port of entry cargo facility at O'Hare Airport, Chicago, Illinois, Customs Inspector Ronald Drozek discovered an attempt to smuggle into the United States marijuana with a street value of $100,000.00. The marijuana had been secreted within a table top and the table top enclosed in a package. The package was shipped from Calcutta, India, and consigned to respondent at 61 East Goethe Street, Chicago, Illinois. After discovering

the marijuana, Inspector Drozek resealed the package and arranged for it to be delivered under controlled conditions to respondent at his apartment. Thirty to forty-five minutes after receiving the package and taking it into his apartment, respondent was arrested when he pushed the package into the hallway of his apartment building and the package was retaken by the law enforcement agents who had maintained surveillance in the building. The package was then transported to Chicago Police Headquarters, reopened, and the smuggled marijuana inventoried.

Prior to trial, respondent moved to suppress the evidence as having been seized in violation of his fourth amendment rights because no search warrant had been secured. Petitioner asserted that no warrant was required to justify the reopening of the package because the package had been properly searched and contraband discovered during a lawful customs border inspection and then delivered to respondent under controlled conditions. The trial court however, erroneously believing that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979), somehow affected the issue of the retaking of the package by law enforcement agents following a lawful customs search and subsequent controlled delivery, held that a warrant was required to retake the package and suppressed the seized marijuana. On appeal, the Illinois Appellate Court, rejecting the contrary determination of the majority of courts to reach this issue, believed that respondent had a legitimate expectation of privacy in the package, an expectation that somehow developed immediately after the controlled delivery of the package to respondent. The Appellate Court concluded that the warrantless reopening of the package therefore violated respondent's fourth amendment rights. The holding of

the Illinois Appellate Court is not only patently erroneous, but elevates the fourth amendment to a position far beyond its spirit, intent, or purpose.

As this Court has long held, the fourth amendment protects only those areas in which a person has a legitimate expectation of privacy, not those areas in which he holds a mere subjective belief that no one will enter. *Katz v. United States*, 389 U.S. 347 (1967); *Rakas v. Illinois*, 439 U.S. 128 (1978). Indeed, this Court has recognized that an individual must establish a legitimate expectation of privacy in the area searched as a constitutional prerequisite to establishing a fourth amendment violation. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Further, regarding items sent through the mails, when the consignor of a package has "reason to assume that it would be opened before it arrives at its destination," he can have no expectation of privacy in the package which will be recognized as legitimate for purposes of the fourth amendment. *Walter v. United States*, 447 U.S. 649, n.12 (1980). Thus, while a person may believe that he has found the perfect hiding place, he can have no reasonable or protected expectation that he or his possessions will not be discovered if others have the right to inspect the contents of the package.

In the case of a package shipped across the border, this Court has long recognized the right of customs officials to inspect the contents of the package without probable cause and without a warrant. *United States v. Ramsey*, 431 U.S. 606 (1977). Indeed, searches made at the border, "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and items crossing into this country," are reasonable within the meaning of the fourth amendment simply by virtue of the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606, 616

(1977). The conclusion that any package shipped across the border may be lawfully searched and seized without infringing on any fourth amendment interest of the recipient has been reasserted in a long line of cases from this Court.[1] It appears that the premise for the conclusion that any package transported across the border is properly subject to search and seizure "at random by a customs officer," is simply that neither the consignor nor the consignee can have any legitimate expectation of privacy in a package entering the United States from across international borders.

Almost a century ago, in *Boyd v. United States*, 116 U.S. 616 (1886), this Court observed:

> As the act [of July 31, 1789, 1 Stat. 29, 43] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches of this kind [border searches] as "unreasonable," and they are not embraced within the prohibition of the [fourth] amendment. 116 U.S. at 623.

The principle that border searches are not subject to the warrant provisions of the fourth amendment and are "reasonable" within the meaning of that amendment has been emphatically reaffirmed by this Court. In *Carroll v. United States*, 267 U.S. 132 (1925), after noting that "[T]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable," 267 U.S.

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[1] This sovereign right was recognized by the First Congress, Act of July 31, 1789, ch. 5, 1 Stat. 29 (1789), and statutes exempting border searches from probable cause and warrant requirements have been in force in this country ever since. *See Barnett*, A Report on Search and Seizure at the Border, 1 Am. Crim. L. Q. 36 (1963); 3 LaFave, Search and Seizure: A Treatise on the Fourth Amendment 276 (1978).

at 147, this Court recognized the fundamental distinction between searches within this country, requiring probable cause, and border searches:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may lawfully be brought in. 267 U.S. at 153-154.

More recently, in *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971), this Court reiterated this long-standing history and noted the policy behind this exception to the fourth amendment:

> But a port of entry is not a traveler's home. His right to be left alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage and their power to do so is not questioned in this case; it is an old practice and is intimately associated with excluding illegal articles from the country. 402 U.S. at 376.

Later, in *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973), this Court noted the constitutional distinction between searches occurring at national borders and searches governed by the fourth amendment:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers '[t]o regulate commerce with foreign Nations.' Art. I, sec. 8,

> cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. 413 U.S. at 125.

Then, in *United States v. Ramsey*, 431 U.S. 606 (1977), this Court traced the history of border searches and emphatically concluded that border searches, from before the adoption of the fourth amendment, have been considered "reasonable" by the single fact that the person or item in question had entered into our country from outside. This Court noted that this "long-standing recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the fourth amendment itself." 431 U.S. at 619.

And, only last term, this Court reaffirmed its firm adherence to this long-standing exception to the fourth amendment, stating:

> The luggage carried by a traveler entering the country may be searched at random by a customs officer, the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982).

In short, this Court has unwaveringly held that border searches, grounded in the long-standing right of the sovereign to protect itself, are reasonable within the meaning of the fourth amendment simply by virtue of the fact that they occur at the border. Thus, although not every package crossing the border is searched, any package may properly and lawfully be searched by customs officials in order to exclude illegal items from entering this country. Therefore, because any package shipped across the border "may be searched at random by a customs officer," *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982), any expectation the recip-

ient might have that the contents of the package will not be discovered is unreasonable.

In the case at bar, respondent could have had no legitimate expectation of privacy in the contents of the package. He packaged the contraband inside a table top and shipped it through the international mail from Calcutta, India, to his apartment in Chicago, Illinois. (Tr. 30) The package was thus subject to being opened by customs officials at the border. In fact, the package was properly searched by a customs inspector as it crossed the border and the contraband was discovered. Any expectation that respondent might have had that the contraband was hidden in a private place was certainly unreasonable. Indeed, the majority of courts to address the issue have held that the recipient of a package that has been shipped across the border has no legitimate expectation of privacy in the contents of the package because the package is subject to inspection "at random" at the border. *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982).

Moreover, apart from recognizing the legitimacy of the customs search and the resultant discovery of contraband, these courts have recognized that law enforcement officials are entitled to deliver the package containing contraband under controlled conditions, to the intended recipient in an attempt to apprehend those involved. Indeed, this Court has observed that "[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

The rationale underlying the use of controlled deliveries is clear. If law enforcement officials come into possession of contraband that is in transit, they can, of course, legally seize the contraband and thereby frustrate its distribution. However, this leaves the parties involved free to try again. Thus, in the justifiable attempt to apprehend others involved in the criminal scheme, law enforcement officials send the contraband to the designated consignee in order to gather further facts and establish probable cause to arrest other participants in the criminal scheme. *See McConnell v. State*, 595 P.2d 147, 154, n.20 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979) (Alaska 1979).

The facts of *United States v. Ramsey*, 431 U.S. 606 (1977), a controlled delivery case, underscore the utility of controlled deliveries as an effective law enforcement technique. In *Ramsey*, customs officials discovered heroin being smuggled into the United States in envelopes mailed from Thailand. They contacted DEA agents who resealed the envelopes and delivered them under "surveillance". Co-defendant Kelly then collected the envelopes and met with the defendant. The DEA agents then arrested the defendant and his co-defendant and seized the envelopes. The controlled delivery of the contraband thus allowed law enforcement officials to ferret out the defendant's and co-defendant's participation in the "heroin-by-mail enterprise."

Courts which have addressed the issue of a controlled delivery, followed by a subsequent warrantless reopening of the package that had been lawfully searched during a customs border inspection, have held that the consignee has no right protected by the fourth amendment. *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981) (con-

curring opinion). As these courts have recognized, the subsequent reopening of the package is not a search at all but merely the reassertion of control over the package and its contents, an act which does not implicate the fourth amendment.

The idea that the recipient of a package has no fourth amendment interest in a package that has been subjected to a lawful customs search and then delivered to the recipient under controlled conditions was recently set forth in *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981). In *Billings*, a customs inspector in New York searched two packages addressed to a post office box in Milwaukee, Wisconsin, and discovered contraband. The packages, containing the contraband, were resealed and delivered to the post office box in Milwaukee under controlled conditions. After allowing the defendant to pick up the packages, and thereby exercise dominion and control over the packages, law enforcement officials arrested him and reopened the packages without a warrant.

In upholding the warrantless reopening of the packages, the court in *Billings* initially determined that because the packages had been previously searched during a lawful customs inspection, the "events in New York and Milwaukee must be viewed as one transaction, with the validity of the arrest and search of the [packages] following arrest dependent upon the validity of the search by the customs agent in New York." 101 Wis.2d at 666. The court then observed that:

> The first search here was a border search. Warrantless searches of international mail have been held constitutionally unobjectionable where a customs agent has reasonable cause to suspect the mail contains contraband. Probable cause to search is not required. *United States v. Ramsey*, 431 U.S. 606, 611-13.

> . . . Th[is] search constituted a proper border search, with seizure taking place only after the [packages] were known to contain cocaine. 101 Wis.2d at 667-668.

The court then reasoned that because the packages had been previously searched during a lawful customs border inspection the defendant "never acquired a reasonable expectation of privacy in the [packages]." 101 Wis.2d at 668. The court therefore concluded that the warrantless reopening of the package after a lawful customs border search and controlled delivery did not violate the defendant's fourth amendment rights. *See: United States v. Richards*, 638 F.2d 765 (5th Cir. 1981); *People v. Bannister*, 447 N.Y.S.2d 829 (1982).

In *People v. Bannister*, 447 N.Y.S.2d 829 (1982), the New York Supreme Court upheld the warrantless reopening of a package under facts strikingly similar to those present in the case under discussion. In *Bannister*, customs officials at New York's Kennedy Airport inspected packages shipped from Nigeria and consigned to the defendant. They discovered marijuana secreted within the packages and contacted DEA agents who arranged for a controlled delivery of the packages to the defendant. After allowing the defendant to exercise dominion and control over the packages, the DEA agents placed him under arrest, seized the packages, and later reopened them without a warrant. In upholding the warrantless reopening, the court first noted that "[t]he . . . opening of the crates and inspection of the contents was a *bona fide* border search and that fact, in and of itself, rendered the search reasonable and valid under the Fourth Amendment without requiring a warrant." 447 N.Y.S.2d at 831. The court in *Bannister* then reviewed the applicable law and found that the intrusion into the van and the removal of the containers and their subse-

quent search was not an independent action requiring a warrant, but merely the continuation of the valid warrantless search and seizure effectuated by the customs agents. The court concluded "it does not serve the purpose of the Fourth Amendment in any way to create unnecessary stumbling blocks" to such law enforcement. 447 N.Y.S.2d at 832-833.

The principle that there is no fourth amendment interest in a package that has been subjected to a lawful customs search and controlled delivery has also been recognized in cases where the initial examination of the package was made by a private party. In *United States v. DeBerry*, 487 F.2d 448 (2d Cir. 1973), an Emery air freight employee in Los Angeles opened a suitcase being shipped to the defendant in New York and discovered 15 bricks of marijuana. He notified Los Angeles narcotics agents who seized the marijuana in plain view and then arranged for a controlled delivery of the suitcase and contraband by New York DEA agents to the defendant in New York City. After allowing the defendant to take possession of the suitcase and place it in the trunk of his car, New York DEA agents arrested the defendant and seized the suitcase. The suitcase was later reopened without a warrant. The Second Circuit Court of Appeals in upholding the warrantless reopening of the suitcase, reasoned that the New York seizure and search was not separate and distinct from the California search because the agents and police in New York were not making an initial seizure, but rather were merely reasserting control over the suitcase which had already been lawfully seized for legal purposes and which was merely being used as bait. The court therefore concluded that no warrant was required to reopen the suitcase.

The rationale underlying the decision in *DeBerry* is clear. The recipient of a package that was the subject of a

lawful search and controlled delivery has no legitimate expectation of privacy in the package. Therefore, any subsequent retaking and reopening of the package following the controlled delivery is not a seizure or search within the meaning of the fourth amendment and therefore no warrant is required to justify the reopening of the package. As the Second Circuit recognized in *DeBerry*, the subsequent retaking and reopening of the package is merely the reassertion of control over evidence "already rightfully within the government's possession." *See McConnell v. State*, 595 P.2d 147, 154 n.20 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979).

In *McConnell v. State*, 595 P.2d 147 (Alaska 1979), *cert. denied*, 444 U.S. 918 (1979), the Alaska Supreme Court upheld the warrantless reopening of a package that had already been lawfully searched by a private party and then delivered to the defendant under controlled conditions. In making its decision, the court enumerated the circumstances necessary for a controlled delivery and subsequent warrantless reopening of the package. First, contraband must be placed in transit from one person to another. Second, the contraband must be initially discovered through lawful means, such as a search by a private person. Law enforcement officials must then come into lawful possession of the contraband and deliver the contraband to the consignee under reasonably continuous surveillance. The reasonably continuous surveillance must continue after the consignee claims the package. Finally, any substantial break in the chain of custody will vitiate the lawfulness of the search. 595 P.2d at 154-155. After enumerating these circumstances, the court concluded in *McConnell*, that

> Thus, . . . the boxes were validly seized and searched pursuant to the *DeBerry* reassertion of control doctrine. The subsequent seizure and opening of the boxes by Anchorage authorities did not constitute a

second, distinct search subject to the fourth amendment's warrant requirement. 595 P.2d at 155.

In each of these decisions, the Court, whether it was a Circuit Court of Appeals or a State Court, recognized that the recipient of a package that had been the subject of a lawful search and controlled delivery has no legitimate expectation of privacy in the package and that any subsequent seizure and search of the package is merely the reassertion of control over the package. These courts have therefore held that after a lawful search and the discovery of contraband the recipient has no rights in the package which are protected by the fourth amendment and therefore, no warrant is required to justify the subsequent retaking and reopening.[2]

Although recognizing the legitimacy of the initial search and the discovery of the marijuana by the customs inspector (Pet. Cert. 7a), the Illinois Appellate Court nevertheless held that respondent possessed a protected expectation of privacy in the package. Confusing the con-

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[2] *See: United States v. Monica*, 663 F.2d 1173 (2d Cir. 1981); *United States v. Richards*, 638 F.2d 765 (5th Cir. 1981) (concurring opinion); *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975); *People v. Adler*, 50 N.Y.2d 730, 409 N.E.2d 888 (1980); *State v. Billings*, 101 Wis.2d 663, 305 N.W.2d 171 (1981); *State v. Pohle*, 166 N.J. Super. 504, 400 A.2d 109 (1979). *People v. Plantefaber*, 91 Mich. App. 764, 283 N.W.2d 847 (1979), rev'd on other grounds, 410 Mich. 594, 302 N.W.2d 557 (1981); *State v. Johnson*, 569 S.W.2d 808 (Tenn. 1978); *State v. Edwards*, 197 Neb. 354, 248 N.W.2d 175 (1977). But *see*, *People v. Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980) (warrant required to reopen package following lawful customs search and controlled delivery), *cert. granted*, judgment vacated and remanded *sub nom.*, *California v. Riegler*, 453 U.S. 919 (1981), following remand original judgment reinstated in *People v. Riegler*, 127 Cal. App. 3d 317, 179 Cal. Rptr. 530 (1981), *cert. pending*, ... U.S. ..... .

stitutional distinction between a subjective and a legitimate expectation of privacy, the Illinois Appellate Court believed that the decisions in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 422 U.S. 753 (1979), required the suppression of the marijuana because no warrant had been secured prior to the reopening of the package. The Appellate Court mistook this Court's comment in *Sanders* that "[t]he mere reasonableness of a search assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment," 442 U.S. at 758, for a judicial command that a warrant is required anytime a package is seized, regardless of the surrounding circumstances.

Blindly equating the package in the instant case, which had previously been subjected to a lawful customs search and delivered under controlled conditions, to the double locked footlocker in *Chadwick* and the suitcase in *Sanders*, both of which had never been subjected to a prior lawful search or seizure, the Illinois Appellate Court believed that respondent had a legitimate expectation of privacy in the smuggled contraband that arose when DEA Agent Labek and Chicago Police Officer Lipsek allowed respondent to exercise dominion and control over the contraband, a necessary element of the offense of possession, for thirty to forty-five minutes before arresting him. This belief is patently erroneous.

Although *Chadwick* and *Sanders* did hold that a warrant was required before the packages involved there were opened, there is a difference of constitutional dimension between those searches and the one involved here. In both *Sanders* and *Chadwick* the respondents manifested an expectation that the contents of their respective packages would remain free from public examination. Neither Chadwick nor Sanders had sent his package through a customs checkpoint where it was sub-

ject to being "searched at random." *United States v. Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982). In contrast, when the instant respondent arranged for the contraband to be sent to him through the international mail, he manifested a specific recognition that the package would be the object of a lawful customs inspection. And, this Court has certainly never so much as suggested that an individual has a constitutionally protected expectation of privacy in a package when, by his own actions, that person causes the contents of his package to be exposed to public examination. In fact, this Court could not have done so without rejecting express the determination in *Rakas v. Illinois*, 439 U.S. 128 (1978), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), that the fourth amendment protects only legitimate expectations of privacy.

What the Illinois Appellate Court in the case at bar failed to appreciate is that the prior lawful customs inspection of the package prevented the table top from being a mere package subject to the rules of *Chadwick* or *Sanders*. At the point of the lawful customs inspection, as this Court's recent holding in *Ross* demonstrates, respondent had no legitimate expectation of privacy in the package. Contrary to the Illinois Appellate Court's view, there was no expectation of privacy that was somehow created during the thirty to forty-five minute period the package was in respondent's apartment. When respondent pushed the package into the public hallway it was lawfully retaken by the agent maintaining surveillance.

The Appellate Court also confused the concepts of custody and possession. The two are distinct. Custody does not mean possession. Nor does custody require constant surveillance. Custody means the right to control. That right does not vanish the instant the item or person in custody leaves the custodian's hands or sight. Custody can be maintained without constant possession or surveillance. See *United States v. Edwards*, 415 U.S. 800 (1974).

In *United States v. Edwards, supra*, police arrested the defendant for breaking into a post office and placed him in a jail. The next morning, some ten hours later, police, acting without a warrant, removed the defendant's clothes and examined them for incriminating evidence. Evidence was found and used to convict the defendant. The United States Court of Appeals for the Sixth Circuit overturned the conviction on the ground that police should have obtained a warrant before removing the defendant's clothes and examining them. This Court reversed the Court of Appeals and reinstated the conviction, holding that no warrant was required.

This Court noted that police seized Edwards and his clothes when they arrested him. Even though the police permitted Edwards to keep his clothes overnight and even though there was no indication, or reason to believe, that Edwards and his clothes were under constant surveillance during that time, this Court then held that from the time of arrest on "the police had lawful custody of Edwards and necessarily of the clothing he wore." *Id.* at 806.

Because the clothes were already in lawful custody, they could be examined without a warrant. "When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered." *Id.* at 806. The movement and examination of evidence that police had already properly seized and kept in custody violated no legitimate expectation of privacy. This Court concluded,

> Indeed, it is difficult to perceive what is unreasonable about the police's examining and holding as evidence these personal effects of the accused that

they already have in their lawful custody as the result of a lawful arrest. *Id.* at 806.

The underlying rationale of *Edwards* is that custody in the fourth amendment context, means the right to control and does not require constant possession or surveillance. That is why the police in *Edwards* were held to have retained custody over Edwards' clothes even though they let Edwards keep the clothes overnight and even though the police did not watch the clothes constantly. It was sufficient that the police retained the power to control the movement of Edwards' clothes and would not have let Edwards take them out of the building.

This is the same concept of custody used in other contexts. Title 18 U.S.C. sec. 549 makes it unlawful to remove goods in "customs custody." Courts have held for purposes of this statute, goods imported into the United States are in customs custody from the moment of their arrival in the United States until they have been inspected, found to be correctly invoiced and found to otherwise comply with the laws of the United States, regardless of whether the Customs Service has actual physical possession. See *United States v. Harold*, 588 F.2d 1136, 1142 (5th Cir. 1979); *Mungo v. United States*, 423 F.2d 1351, 1354 (4th Cir. 1970). See also *Harris v. Dennie*, 28 U.S. 292, 303-304 (1830) (Interpreting predecessor statute).

Similarly here, law enforcement agents retained the power to control the movement of the items seized at customs during the controlled delivery and would not let respondent take them out of the building. Law enforcement agents delivered the items to respondent in person. After respondent took possession of the items Agent Labek stood watch so that respondent could not leave the building with them. At the first opportunity when respondent fortuitously pushed the package into the hallway, Agent

Labek retook the items. Thus, law enforcement agents maintained custody over the previously seized items throughout the controlled delivery. Respondent's temporary possession of the items for 30 to 45 minutes during the controlled delivery was as irrelevant to the question of custody as was Edwards' possession of his clothes in the ten hours after his arrest. In neither case did the temporary gap in government possession of the seized items terminate government custody of the seized items. Hence, in the instant case, as in *Edwards*, no warrant was required to remove and examine the previously seized evidence following the temporary break in government possession.

This is the conclusion reached by almost every court that has considered whether police need a warrant to retrieve evidence following a controlled delivery. The leading case is *United States v. DeBerry, supra*, 487 F.2d 448 (2d Cir. 1973). The United States Court of Appeals for the Second Circuit, held that the police did not need a warrant to retake and reopen the suitcase containing marijuana where the marijuana had first been discovered by a private party who told government agents, who then made a controlled delivery to the recipient. The Court reasoned that throughout the controlled delivery the suitcase and its contents "remained legally 'seized' just as much as if it were under the actual physical control of the police." *Id.* at 451. Therefore, when the police retook the bag "they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait." *Id.* at 451. The same analysis applies here and the same conclusion follows.

The *DeBerry* approach is reinforced by practical considerations that the Illinois Appellate Court ignored. The Appellate Court's insistence upon constant possession or

surveillance unreasonably impedes legitimate police investigation.

The fact that the package in the instant case was in the respondent's apartment for thirty to forty-five minutes did not affect the agent's ability to retake the package without a warrant. This Court has simply never required law enforcement officers to maintain constant exclusive physical possession or surveillance over an object in order to later search that object without a warrant. Indeed, this Court has recognized that exclusive physical possession or surveillance, if not impossible, is oft times difficult to maintain and often serves no purpose. Thus, in *United States v. Edwards, supra*, 415 U.S. 800 (1976), although the arresting officers had probable cause to believe that articles of the defendant's clothing were themselves material evidence, they waited for approximately 10 hours before seizing the defendant's clothing without a warrant and holding it as evidence. There was no indication, or even any reason to believe, that the defendant or his clothing had been kept under surveillance during the 10 hour period the defendant was in custody. Indeed, the evidence, paint chips, could easily have been brushed off by the defendant. However, holding that no warrant was required to remove the defendant's clothing even though the clothing had not been in the officers' actual physical possession the entire 10 hour period, this Court noted that prior to the removal of the defendant's clothing, "the police had lawful custody of [Edwards] and necessarily of the clothing he wore." 415 U.S. at 806.

Similarly, in *Chambers v. Maroney*, 399 U.S. 42 (1970), this Court upheld the warrantless search of the defendant's car that had been left in the police station parking lot overnight before being searched in the morning. Again, there is no indication, nor any reason to believe

that the car was kept under constant surveillance. This Court upheld the warrantless search however, because it was the same car and because "[t]he probable-cause factor still obtained." *Id.* at 52. *Accord, Texas v. White*, 423 U.S. 67 (1973). The same material facts which support the conclusions in *Edwards* and *Chambers* obtain in the controlled delivery situation presented by this case. There is simply no question that the package Agent Labek observed in the hallway was the same package that he had delivered to respondent thirty to forty-five minutes before. (Tr. 32) Moreover, the probable cause factor quite clearly still obtained.[3]

Most recently in *Michigan v. Tyler*, 456 U.S. 499 (1978), this Court upheld the warrantless search of a crime scene even though there was a period of approximately four hours during which the crime scene was not under surveillance. In *Tyler*, fire officials extinguished a fire and began searching the premises for evidence of arson. They were forced to leave the scene however, because "visibility was severely hindered by darkness, steam and smoke." *Id.* at 511. They returned four to five hours later and resumed their search. The defendant moved to suppress the fruits of the search because the fire officials never obtained a warrant. This Court held that the initial search was reasonably incident to the lawful entry to put out the fire, and treated the second search as a continuation of the first despite the four hour period during

[3] The Illinois Appellate Court suggested that because of the thirty to forty-five minute interval, the law enforcement officials were not absolutely certain that the package contained contraband. Law enforcement officers however, were not absolutely certain they would discover incriminating evidence in *Edwards* or *Chambers*. The rule, however, is that "sufficient probability, not certainty is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 804 (1971).

which law enforcement officials were not present at the site of the arson. This Court reasoned:

> Little purpose would have been served by [the fire officials] remaining in the building except to remove any doubt about the legality of the warrantless search and seizure later that same morning. Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the result, seizure of evidence. *Id.* at 511.

In the case at bar, as in *Edwards*, *Chambers*, and *Tyler*, the respondent did not acquire a legitimate expectation of privacy in the package during the thirty to forty-five minute interval that the package was in the respondent's apartment. In fact, by allowing the respondent to take the package into his apartment, Agent Labek and Officer Lipsek were acting reasonably, indeed, even commendably. First, because dominion and control is a necessary element of the offense of possession, the law enforcement officials allowed respondent to exercise a requisite amount of control over the package. This was accomplished by allowing him to pull the package into his apartment.

Further, in an attempt to comply with the law, Officer Lipsek left to obtain a warrant once it became apparent that respondent was going to take the package into the apartment. This Court has long held that one of the major goals of the fourth amendment is to prevent warrantless intrusions into private homes. It would be anomalous to interpret the fourth amendment to penalize the law enforcement officials in this case because they refrained from entering into respondent's home without a warrant. Agent Labek acted commendably when he waited for thirty to forty-five minutes for Officer Lipsek to return with a warrant. The fact that respondent fortuitously left the apartment with the package containing contraband in an apparent attempt to start distribution before Of-

ficer Lipsek could return with a warrant hardly renders the agent's retaking of the package improper. The agent's forbearance was necessary and reasonably incident to the controlled delivery and did not create a legitimate expectation of privacy in a package where none was before.

Moreover, if law enforcement officials were required to retake the package at the moment of delivery, as the Illinois Appellate Court suggests, they would not be able to ferret out possible confederates of the consignee. *See, United States v. Ramsey, supra,* 431 U.S. 606 (1977). Further, if Agent Labek and Officer Lipsek had retaken the package at the moment of delivery, a myriad of difficulties in proving necessary possession on respondent's part would have arisen at trial if respondent had simply denied any knowledge of the marijuana secreted within the table top. Additionally, implicit in the holding of the Illinois Appellate Court is the requirement that Agent Labek and Officer Lipsek perform the impossible under the facts of this case, facts which are not unique. The holding of the Illinois Appellate Court requires law enforcement officers to maintain actual eye contact with the package rather than surveillance of the apartment and knowledge that the package over which they reasserted control is the same package that was delivered. This holding penalizes law enforcement officers who attempt to apprehend others involved in the criminal enterprise. Moreover, it is extremely dangerous for law enforcement officials to enter or break into a private home to make a narcotics arrest, and in fact without consent or exigent circumstances would be illegal. The possibility of violence also makes such a procedure perilous. In the case at bar, respondent was intimately involved in a criminal narcotics enterprise as demonstrated by the fact that he was the recipient of contraband which filled a table that was 3 feet in diameter and 10 inches thick, contraband which had a street value of $100,000.00. It is clear that the

actions of the law enforcement officials were eminently reasonable and the officers at all times acted in the good faith execution of their duties.

There are thus, no technical or doctrinal reasons why the thirty to forty-five minute interval transformed the previously searched package into a *Chadwick* or *Sanders* package. Rather, as noted by the Seventh Circuit Court of Appeals in distinguishing between a *Sanders* search and a controlled delivery reassertion of control:

> Even as "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461-462 (1971) . . . we do not believe that the Supreme Court in *Sanders*, in which it recognized that 'the circumstances giving rise to suppression requests can vary almost infinitely,' intended that the word 'luggage' would automatically require suppression to the exclusion of all other prior testimony surrounding the application of the Fourth Amendment. *Sanders*, *supra*, 442 U.S. at 757. *United States v. Bulgier*, 618 F.2d 472, 476 (7th Cir. 1980).

In summary, petitioner respectfully submits that no warrant was required to justify the reopening of a package which had been sent through customs. Respondent had no legitimate expectation of privacy in the package because it was the subject of a lawful customs inspection, which could properly be conducted at random, and a subsequent controlled delivery. Rather, as properly recognized by the majority of courts, the retaking and reopening of the package was merely the reassertion of control over a package in which respondent had never had any legitimate expectation of privacy. Therefore, since respondent had no rights in the package which are protected by the fourth amendment, no warrant was required to justify the retaking and reopening of the package.

CONCLUSION

For all the foregoing stated reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District

BRIEF FOR RESPONDENT

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 3, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

QUESTION PRESENTED

The warrantless opening by police of John Andreas' sealed container, and the warrantless cracking open of the solid wood table top within, were violations of his Fourth Amendment rights and rendered the contents inadmissible at trial, where the police had seized the sealed container, taken it to a protected location, and there were no exigent circumstances.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On February 22, 1979, police officers seized a closed, sealed container from John Andreas. (R. 17) John Andreas was arrested in the building hallway outside the door of his apartment. (R. 17) The container was seized at that same location at that time. (R. 17) The container was taken in its closed, sealed condition to police headquarters. It was later opened by police outside the presence of John Andreas. (R. 36) The container had two

locks affixed to hinges. (R. 42) It was not possible to see into the container when it was closed. (R. 35) The police had no warrant for the search of the container. (R. 36)

Evidence was introduced that customs agents had searched a container on February 21, 1979, at O'Hare Airport. (R. 41-42) Contraband was discovered in that package. (R. 43) Police agents Labek and Lipsek delivered a sealed container of the same description to the apartment of John Andreas on February 22, 1979. Neither officer had been present when that package had been sealed at the airport. They left the container with John Andreas in the hallway in front of his apartment door. (R. 16) Officer Labek saw John Andreas pull the container into his apartment. They then left the vicinity of the hallway. (R. 22) John Andreas was arrested in that hallway some 30 to 45 minutes later. (R. 16-17) It was at that time that the seizure of the container occurred. The apartment was not under surveillance during the 30 to 45 minute period. (R. 22, 38) It was after this seizure that the container was transported to the police station and eventually opened. Contraband was allegedly discovered. (R. 37)

Contrary to representations in the petitioner's statement of the case, there is no evidence that Inspector Drozek arranged for a "controlled delivery" with the agents of the DEA or anyone else. (Pet. Brief p. 3) (R. 40-44) Furthermore the Illinois Appellate Court specifically found that no "controlled delivery" had taken place.

Contrary to representations in the petitioner's brief, the Illinois Appellate Court did not reject the reasoning and holding of the Seventh and Tenth Circuit Courts of Appeal. (Pet. Brief p. 5) The Illinois Court correctly ruled that the holdings were inapplicable to the factual circumstances of this case.

Contrary to representations in the petitioner's brief, the Illinois Appellate Court did not rule that a warrant was needed to retake the package in this case. (Pet. Brief p. 8) The Illinois Court correctly ruled that after the warrantless taking a warrant was required to open and search the container.

Contrary to representations in the petitioner's brief, no evidence was introduced to show that the respondent ". . . packaged the contraband inside a table top . . ." (Pet. Brief p. 13)

Contrary to representations in the petitioner's brief, no evidence was introduced to show that the respondent was leaving his apartment "to start distribution." (Pet. Brief p. 27)

Contrary to representations in the petitioner's brief, no evidence was introduced as to the "street value" of any contraband. (Pet. Brief pp. 7, 28)

Contrary to representations in the petitioner's brief, there is no evidence that the container was taken by Agent Labek "at the first opportunity." (Pet. Brief p. 23) Such testimony would have been impossible in the light of his unequivocal testimony that he did not have the apartment under his surveillance. (R. 22)

SUMMARY OF ARGUMENT

Respondent submits that the factual circumstances surrounding the seizure of the container at the time of the arrest of John Andreas and the subsequent warrantless search are indistinguishable from the facts in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979). The container was searched while under full dominion and control of law enforcement officials in the absence of exigent circumstances. A warrant was required; none was obtained.

The reliance by the petitioner upon the reasoning of some Courts of Appeals in "controlled delivery" cases is misplaced, since the factual circumstances surrounding the delivery here show a loss of control. There was no evidence to show the continuity of seizure required by every single case cited by the petitioner. There was no continuity between Customs Inspector Drozek and the agents making the delivery. There was a break in the control after the delivery. For these reasons, the respondent submits that the question of whether there should be an exception to the warrant requirement in cases involving a "controlled delivery" after a prior lawful search need not be decided by this Court on these facts.

ARGUMENT I

THE WARRANTLESS OPENING BY POLICE OF JOHN ANDREAS' SEALED CONTAINER, AND THE WARRANTLESS CRACKING OPEN OF THE SOLID WOOD TABLE TOP WITHIN, WERE VIOLATIONS OF HIS FOURTH AMENDMENT RIGHTS AND RENDERED THE CONTENTS INADMISSIBLE AT TRIAL, WHERE THE POLICE HAD SEIZED THE SEALED CONTAINER, TAKEN IT TO A PROTECTED LOCATION, AND THERE WERE NO EXIGENT CIRCUMSTANCES.

The Fourth Amendment of the Constitution of the United States dictates that in the absence of exigent circumstances a search warrant is required before law enforcement authorities may open a sealed container which they have lawfully seized at the time of the arrest of its owners, even where there is probable cause to believe the container contains contraband. *United States v. Chadwick*, 433 U.S. 1 (1977). This rule applies generally to containers, footlockers, suitcases and other luggage of general description. The failure of a person to lock such a container will not alter its fundamental character as a repository for personal, private effects. *Arkansas v. Sanders*, 442 U.S. 753 (1979).

The present case falls squarely in the center of these general principles of Fourth Amendment law. The container was seized at the time and place of the arrest of John Andreas, similar to the seizures in both *Chadwick* and *Sanders*. Like the footlocker in *Chadwick*, the container seized from John Andreas was a closed, opaque shipping container. (R. 34, 35) Just as in *Chadwick* and in *Sanders*, the container was seized by law enforcement agents at the time and place of the arrest of the defendant. (R. 34, 35) Law enforcement officials transported the closed container to Chicago Police Headquarters. They

opened it within the police station outside the presence of John Andreas. (R. 39) They then cracked open a solid wood table top within the container and allegedly obtained contraband. (R. 37, 39) No consent was given. No warrant was ever obtained. (R. 36)

The securing of the container at the Chicago Police Headquarters was similar to the securing of the footlocker in *Chadwick*. Here the package was ". . . safely immobilized" and therefore "it was unreasonable to undertake the additional and greater intrusion of a search without a warrant." *Chadwick* at 13. There were no exigent circumstances at the Chicago Police Headquarters so as to remove the requirement of a search warrant.

> . . . The Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority . . . *Chadwick* at 15.

It is hard to imagine how the container could have been more "under the exclusive dominion of police authority" than at the Chicago Police Headquarters. Both *Chadwick* and *Sanders* require a warrant for the search at the Chicago police station.

Despite this "exclusive dominion" the petitioner has argued that the warrant requirement should be excused because the police acted reasonably. (Pet. Brief pp. 28-29) But the warrant requirement cannot be excused on that basis.

> "The mere reasonableness of a search assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Sanders* at 758.

The petitioner argues that these cases should not apply because there was not a legitimate expectation of privacy

in the package. (Pet. Brief pp. 8, 28 et passim) The case that petitioner cites for this proposition states otherwise. *Katz v. United States*, 389 U.S. 347. "The Fourth Amendment protects people, not places." *Katz* at 351. The rationale of *Katz* was precisely that the defendant had a right to privacy in a telephone booth that did not revolve around property interests. It is the petitioner's misunderstanding of the Fourth Amendment which apparently prompts the citations of *Rakas v. Illinois*, 439 U.S. 128 (1978) and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), both dealing with issues of "standing." The factual circumstances demonstrate that the Fourth Amendment standing of the defendant in this case was no different than the standing of the parties in *Chadwick* and *Sanders*.

The petitioner's attempt to place the burden of an exception to the Fourth Amendment on the package, instead of on the respondent's right, causes the State to develop an elaborate theory of "extended border search" that is not supported by the "controlled delivery" cases cited in petitioner's brief. Petitioner argues that the legitimate expectation of privacy did not exist because the container travelled in an international shipment. For the limited purpose of the original motion, the respondent did not question the legitimacy of the February 21 customs search. But the container seized from John Andreas was not seized at the border or its functional equivalent. He was lawfully within the country and was entitled to the protections afforded by the Fourth Amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

To support this "extended border search" theory the petitioner has cited the case of *United States v. Ramsey*, 431 U.S. 606 (1977). Once again the facts of this case do not demonstrate rule advocated. Rather in *Ramsey*, after the initial opening of international mail by a customs agent he closed the envelopes and sent them in a locked

pouch to Washington "where agents of the Drug Enforcement Administration, *after obtaining a search warrant*, opened the envelopes again and removed most of the heroin." *Ramsey* at 610. (Emphasis added)

The petitioner has advanced the argument that no warrant was required because of a "controlled delivery". This "controlled delivery" argument is discussed in detail in the following sections of this brief. But petitioner's contention fails to take into account the factual circumstances of the delivery in this case. The Illinois Appellate Court best summarized those facts:

> Instead of retaining dominion and control of the package, as in the "controlled delivery" cases, the authorities here relinquished such control. . . . The retrieval of the container in the defendant's hallway must be deemed to have constituted a new seizure distinct from the original seizure on February 21. *People v. Andreas*, 426 N.E.2d at 757-758.

The new seizure by law enforcement officers was indistinguishable from the seizures in *Chadwick* and in *Sanders*. The same warrant requirement existed:

> "Where,—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected." *Sanders* at 766.

The exceptions to the warrant requirement are few and are jealously and carefully drawn. *Sanders* at 759. The petitioner has failed to demonstrate any exception in the present case. The Illinois Appellate Court properly suppressed the results of the search at the Chicago Police Headquarters.

ARGUMENT II

THE ILLINOIS APPELLATE COURT CORRECTLY REJECTED THE ARGUMENT THAT THIS CASE INVOLVED A "CONTROLLED DELIVERY."

The petitioners advanced as a general proposition of law that a "controlled delivery" after a previous lawful search will provide an excuse to disregard the warrant requirement. It should be noted that the Illinois Appellate Court did not dispute this proposition of law. The Court simply found that the facts in this case did not support the application of the proposed exception, since there was no controlled delivery.

Respondent is aware of no case in which this Court has directly addressed the question of whether a warrant is required after a lawful customs search and subsequent delivery under controlled conditions with constant surveillance. See *California v. Riegler*, Application for Stay granted, 449 U.S. at 1322 (1981). Since this "controlled delivery" reasoning underlies the argument of the petitioners, the respondent will discuss it here. However the respondent in no way concedes that the facts in this case correspond to the concept of "controlled delivery" found in the several cited opinions of the Courts of Appeals.

The concept of "controlled delivery" evolved in some Courts of Appeal involves a continuous seizure of the contents of a container from the time of the first lawful search to the time of the second search. Courts of Appeals have considered situations where a warrantless search of a container has been followed by a delivery under controlled conditions and close surveillance. Petitioner has cited the case of *United States v. DeBerry*, 487 F. 2d 448 (2nd Cir. 1973). In that case an Emery Air Freight em-

ployee performed the initial search of a container in transit to DeBerry. The results of this private search were made known to police, who seized the contraband in plain view. The police officer at the initial seizure marked each brick of marijuana before repacking and closing the suitcase. He placed his initials on the outside. He then transmitted to receiving agents a detailed description of the suitcase and its contents. Defendants were later allowed to pick up the suitcase and walk to their car. They were under close and constant surveillance until their arrest at the car.

Petitioner has chosen to analyze *DeBerry* on the basis of the lack of reasonable expectation of privacy in the package by the recipient. Nowhere in the opinion did the Second Circuit discuss DeBerry's expectation of privacy. Rather, the Court of Appeals looked to a continuity of the original seizure of the contents of the package, based upon plain view principles, through the moment of the later search. The opinion recites a detailed description of the constant surveillance and control of the container by law enforcement officials. The opinion notes that the transfer of the package from one group of police to another was accompanied by detailed information to insure the integrity and continuity of the seizure of the contents.

It is the continuity of seizure from the initially lawful seizure which has prompted the various Circuits to sanction later warrantless searches. If the police lose control of the container at any point, they must effect a new seizure. *United States v. Edwards*, 602 F. 2d 458 (1st Cir. 1979). If control over the package is relinquished so that a new seizure must take place in order to accomplish a new search, then that continuity of seizure with the initial search and seizure is broken. Of course any new

and separate search would require a warrant. *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 422 U.S. 753 (1979). For this reason one notes in each opinion cited by the petitioner a close review of the factual circumstances to assure the unbroken continuity of the seizure.

In *United States v. Ford*, 525 F. 2d 1308 (10th Cir. 1975), the 10th Circuit found the factual circumstances indistinguishable from *DeBerry*, in that the defendant's package was seized at the airport where she attempted to retrieve it. Once again, the package had previously been marked by police.

> "This official dominion continued *unbroken* because close surveillance followed the seized contraband, insuring that it remained within official possession." *United States v. Ford*, 525 F. 2d at 1313. (Emphasis added)

Both *United States v. Bulgier*, 618 F. 2d 472 (7th Cir. 1980) and *United States v. Andrews*, 618 F. 2d 646 (10th Cir. 1980), involve similar factual situations where the defendants picked up the package at an airport under police surveillance and were arrested as they walked away. Both courts quoted verbatim the above sentence from *Ford* as their rationale.

In *United States v. Modica*, 663 F. 2d 1173 (2nd Cir. 1981), the 2nd Circuit noted the extensive surveillance of the defendant from the moment he picked up the suitcase until he drove up to his home where the suitcase was retrieved from the car trunk.

In *United States v. Richards*, 638 F. 2d 765 (5th Cir. 1981), the 5th Circuit reviewed the surveillance in detail and specifically noted that the defendant had no opportunity to leave the scene with the parcel from the moment he had picked it up. Each of the other "controlled de-

livery" cases cited by the petitioner involves this same examination for strict continuity of seizure.*

The case of *United States v. Edwards*, 602 F. 2d 458 (1st Cir. 1979), cited by the government (Amicus Brief, page 7, Footnote 4) provides additional insight into the correct rationale for the lower court's opinions. The basic facts read familiarly. A search of a container by an airport employee revealed heroin. Police were called and seized the opened container and contents in plain view. Defendant Richards picked up the package from Boston airport under surveillance. Agents followed him to defendant Edwards' house. Agents watched Richards and Edwards carry the package into the house. Shortly thereafter agents entered the house to arrest the defendants. They then secured the house and waited for warrant before searching the house and seizing the package. In the course of ruling on other issues the 1st Circuit distinguished these factual circumstances from the "controlled delivery" opinions.

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* The government has cited several additional cases of various circuits. (Amicus Brief, page 7, Footnote 4). It is interesting to note that three of these cases involve the use of electronic beepers actually placed inside the containers during the initial search and seizure. These devices were designed not only to emit a constant tracer signal, but to signal the instant the containers were opened. In each case the government retrieved the container after the latter signal sounded. So the container had already been re-opened by the defendant. *United States v. Sheikh*, 654 F. 2d 1057 (5th Cir. 1981); *United States v. McGreevy*, 652 F. 2d 849 (9th Cir. 1981); *United States v. Hackett*, 638 F. 2d 1179 (9th Cir. 1980). Also cited was *United States v. Barone*, 584 F. 2d 118 (6th Cir. 1978), though it involved no issue as to the seizure or search of the delivered object. In *McGreevy*, *Hackett*, and *Barone* the agents secured the scenes and waited for warrants before making further searches, apparently suffering no hardship thereby in their duty to apprehend wrongdoers.

The opinion specifically distinguished the facts from *DeBerry* and *Ford* noting that the package was in Richards' possession for an hour during which he was beyond the immediate physical reach or control of government agents who followed him to Edwards' home. The Court reasoned that the government could not have exercised "dominion and control" over the package during that time and that, therefore, their retrieval of the package at Edwards' home constituted a new seizure for Fourth Amendment purposes.

A. There Was No "Controlled Delivery" In This Case Following The Customs Search Of The Previous Day.

Whether the Court chooses to accept or reject the reasoning of the Courts of Appeals concerning controlled deliveries after lawful searches, it is clear that such reasoning is inapplicable to the present case. There was no continuity of seizure from the first search by customs officers to the second search in the Chicago police station. No evidence of continuity of seizure of the contents of the package was shown between the February 21 opening and the time Labek picked up the already sealed package on February 22. (R. 27; J.A. 12) It is not sufficient to demonstrate that the metal container was similar to, or the same as, the one Labek had seen open on the previous day. It is the seizure of the contents of the package, not just the metal box, which is crucial. The Illinois Appellate Court found that at most Labek may have had probable cause to suspect what was in the container he picked up on February 22.

Petitioner has complained that a law enforcement officer should not be required to be in actual physical possession of the article in question. This complaint misses the point of the reasoning in the cases petitioner relied upon. The question is not necessarily whether

Labek was personally present during the repackaging. The cases cited by the petitioner show that the question is whether continuity of the seizure of the contents of the container has been demonstrated by Labek's testimony. For example, there is no testimony that Labek was informed by the customs agent Drozek on February 22 of the current contents of the sealed container. (R. 40-44) There is none of the detailed information shared by other agents as in *DeBerry*. There were no markings on the container or other information showing Labek whether the container was now holding the contraband he had previously seen. The continuity of seizure of the contents of the container has not been shown.

An even more significant break in the continuity of seizure occurred after the container was delivered. The container was completely out of the control or surveillance of the police for between a half hour and forty-five minutes. One must simply disregard and dismiss the evidence to declare that Agent Labek "maintained surveillance" of the container, much less its contents. Officer Labek testified in detail about this period of time:

Q. During the half hour to 45 minutes that you stayed in the hall, was Officer Lipsek with you that entire time?

A. I was not in the hallway for the entire 30 to 45 minutes.

Q. Where were you during that 30 to 45 minutes?

A. Do you want me to answer your first question first or answer your second question?

Q. Second question first. Where were you during that 30 to 45 minutes?

A. Part of the time I was in the hall and the rest of the time I was in the building.

Q. Were you on the same floor as the Andreas apartment when you were in the building?

A. No, sir.

Q. So that you did not have the Andreas apartment under personal surveillance during that 30 to 45 minutes yourself?

A. That's correct.

Q. Do you know what happened to Officer Lipsek after you delivered the package?

A. I know now, but I didn't know at the time.

Q. What if anything did Officer Lipsek do during that period of time?

A. He exited the building. (R. 22-23; J.A. 9)

Labek did not maintain surveillance of the Andreas apartment. Even if he had remained in the hallway on the same floor as the apartment, he could have maintained surveillance of nothing more than a closed door. That "surveillance" is clearly insufficient to establish continuity of seizure.

Petitioner relies upon *United States v. Edwards*, 415 U.S. 800 (1974), for the proposition that custody can be maintained without constant possession or surveillance. The factual circumstances as well as the legal principles involved in the searching of Edwards hours after a lawful custodial arrest seem inapplicable here in any context. Surely no evidence has suggested that John Andreas was under arrest during the half hour to 45 minutes in his apartment. In a splendid rewriting of the evidence, petitioner tells us that "After respondent took possession of the items Agent Labek stood watch so that respondent could not leave the building with them." (Pet. Brief p. 23) No testimony supports this claim. But even if it did, it hardly indicates the custody urged by the petitioner. Certainly Agent Lipsek did not consider John Andreas in custody as he travelled to obtain a warrant. Petitioner seeks to expand the Court's rule in *Edwards*

far beyond its context. This attempt is particularly inappropriate where a closed container is involved.

The argument that the container seized in the hall was the same as the container searched the previous day is misleading and irrelevant. It is not the "sameness" of the container which is significant, but the continuity of the surveillance of the container. Furthermore it is not only the continuity of surveillance of the container, but the continuity of surveillance of its contents that is at issue. Neither continuity exists in this case. The Illinois Appellate Court correctly ruled that such continuity had not been shown. Therefore the prosecution improperly relied upon an earlier customs search to justify the later warrantless opening of the container.

The second search in the instant case was an unauthorized invasion of a constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. The results of the warrantless search were properly suppressed.

B. The Facts Of This Case Demonstrate No Need For A "Controlled Delivery" Exception To The Warrant Requirement.

Petitioner argues that the holding of the Illinois Appellate Court "penalizes law enforcement officers who attempt to apprehend others involved in the criminal enterprise." (Pet. Brief p. 28) We have already noted that the holding of the Illinois Appellate Court was limited to the applicability of the "controlled delivery" concept to the factual circumstances of this case. In ruling on this factual question, the Illinois Court made no statement as to the validity of the rule of law. Nevertheless, the only burden imposed by the holding is the same burden discussed by this Court in *Chadwick*. Law enforcement

agents are required to obtain a search warrant for a search. Contrary to the State's contention, this holding does not suggest that law enforcement officers must retake the package at the moment of delivery. (Pet. Brief p. 28) It merely reiterates the Fourth Amendment warrant requirement for the search of the seized container after it has been reduced to police control, regardless of when the seizure occurs.

The government has advanced a similar contention in its amicus brief arguing that "requiring a warrant in such a case would impose a needless burden on law enforcement operations and would weaken the protections of the warrant procedure by trivializing it." (Amicus Brief, page 11). This Court has stated repeatedly that it will not dispense with the fundamental Fourth Amendment protections simply because of a generalized urgency of law enforcement. See e.g., *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971). The Court has been careful to create few exceptions to the warrant requirement. "Police efficiency" or police reasonable belief have never been found to be sufficient grounds for excusing a warrant. *Coolidge, Chadwick, Sanders.*

> "The exceptions have been limited to situations . . . where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequirement for a search." *Sanders* at 759.

Here there is absolutely no "public interest" calling for such flexibility since the package was totally secured at the police headquarters and no emergency existed other than police eagerness and curiosity that required the

package to be opened without a warrant. The petitioners have not stated any hardship or detriment to the law enforcement officials other than the additional time and effort involved in submitting the information gained from their work to the impartial analysis of a judicial officer.

In each "controlled delivery" situation discussed by the Courts of Appeals, the container to be searched has been reduced to the control of law enforcement agents exactly as described in *Chadwick*. Neither in *Chadwick* nor in such "controlled delivery" settings is a warrant required for the seizure of the container. It is only the subsequent search of the seized container that is at issue here. By definition, the container is under control at the time of the desired second search. In the absence of exigent circumstances no greater burden is upon law enforcement than shown in *Chadwick*. Nothing is lost. Arrests or seizures can be made based upon probable cause. No evidence will be lost. The subsequent application for a warrant will subject the police agent's work to judicial scrutiny before valuable rights may be invaded.

If the warrant is excused in a "controlled delivery" setting, then the inescapable result is that the policeman will be the judge of whether he has in fact complied with some judicially drawn requirements of "controlled delivery". The policeman will be judging legal issues at the peril of good law enforcement as well as at the peril of the rights under the Fourth Amendment. On the other hand, if there truly is probable cause, or indeed such tight control as to give certainty, then law enforcement will not be penalized since the warrant will certainly be forthcoming.

The preceding argument demonstrates that the factual circumstances of this case do not even show that a "con-

trolled delivery" occurred. Under these facts the respondent submits that it is not necessary for this Court to rule upon the more general question of whether a warrant is required after a lawful customs search and subsequent delivery under controlled conditions with constant surveillance. Nevertheless, the petitioners have shown no compelling need for such an exception to the general warrant requirement. Certainly the facts of this case demonstrate that no loss to law enforcement would have been suffered by compliance with the warrant requirement. Both law enforcement and the protection of Fourth Amendment rights will benefit by requiring a search warrant for the opening of containers seized as a result of a "controlled delivery".

This Court has considered arguments for exceptions to the warrant requirement in the past and formulated a clear and sound rule of law which was followed by the Illinois Appellate Court.

> "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." *Chadwick* at 548.

The facts in the instant case demonstrate no need to change this doctrine.

CONCLUSION

The judgment of the Illinois Appellate Court affirming the trial court's ruling should be affirmed.

Respectfully submitted,

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No. 81-1843

In the

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHN ANDREAS,

Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District.

REPLY BRIEF FOR PETITIONER

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 81-1843

THE STATE OF ILLINOIS,
Petitioner,

vs.

JOHN ANDREAS,
Respondent.

On Writ Of Certiorari To The Appellate Court
Of Illinois, First Judicial District.

REPLY BRIEF FOR PETITIONER

ARGUMENT

RESPONDENT HAD NO PROTECTED FOURTH AMENDMENT INTEREST IN A PACKAGE CONTAINING CONTRABAND THAT HAD BEEN SEIZED AND EXAMINED DURING A LAWFUL CUSTOMS INSPECTION AND THEN DELIVERED TO RESPONDENT BY LAW ENFORCEMENT AGENTS UNDER CONTROLLED CONDITIONS, AND THEN RETAKEN BY THEM FROM RESPONDENT AFTER HE MOVED THE PACKAGE FROM INSIDE HIS APARTMENT INTO THE HALLWAY OF HIS APARTMENT BUILDING.

The issue in this case remains whether the respondent consignee had any protected fourth amendment interest in a package that had been subjected to a lawful customs inspection and was thereafter delivered to respondent under controlled conditions after the discovery that the package contained contraband. Petitioner has argued that respondent had no legitimate expectation of privacy in the contents of the package because any package shipped across the border is subject to being "searched at random." *United States* v. *Ross*, ... U.S. ....., 102 S.Ct. 2157, 2171 (1982). Therefore, respondent had no protected fourth amendment interest in the package, and no warrant was required to reopen the package after it was delivered to respondent by law enforcement officials under controlled conditions. Respondent has failed to address the fundamental principles of fourth amendment jurisprudence that underlie the petitioner's argument.

In response to petitioner's argument that he had no expectation of privacy in the package, respondent mistakenly equates the package in the instant case to the

double locked footlocker in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and the suitcase in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and claims that his "Fourth Amendment standing [is] no different than the standing of the parties in *Chadwick* or *Sanders*." (Resp. Br. 7) This argument simply ignores the facts of the instant case. There is a difference of constitutional dimension between the expectations of privacy in *Chadwick* and *Sanders*, and the lack of expectation of privacy in the case at bar. In both *Sanders* and *Chadwick* the respondents manifested an expectation that the contents of their respective packages would remain free from examination by government officials. Neither Chadwick nor Sanders had sent his package across the border where it was subject to being examined and lawfully "searched at random" by customs officials. *United States* v. *Ross*, *supra*, at 2171. In contrast, when respondent arranged for the contraband to be sent to him from India through an international air cargo carrier, he manifested a specific recognition that the package could be the object of a lawful customs inspection. 19 U.S.C. sec. 1582; 19 C.F.R., sec. 162.6. In fact, respondent concedes that the search of the package at customs was proper. (Resp. Br. at 7) This Court has never suggested that an individual has a constitutionally protected expectation of privacy in a package when, by his own actions, that person causes the contents of his package to be exposed to examination by government officials. *See, United States* v. *Ramsey*, 431 U.S. 606 (1977). Such a suggestion is contrary to this Court's express determination in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), and *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), that the fourth amendment protects only legitimate expectations of privacy, not mere subjective expectations.

Respondent's confusion over the constitutional distinction between a subjective and a legitimate expectation of privacy prompts him to suggest that the container having been seized, "it was unreasonable to undertake the additional and greater intrusion of a search [at Chicago Police Headquarters] without a warrant.' *Chadwick* at 13" (Resp. Br. 6). The prior lawful customs inspection of the package prevented it from being a package subject to the rules of *Chadwick* and *Sanders*. The package being placed on an international air cargo carrier and consigned to a location within the United States, alone, made the package subject to lawful customs inspection. Therefore, respondent had no legitimate expectation of privacy in the package, and the subsequent retaking and reopening of the package therefore did not violate any fourth amendment right of respondent. Indeed, the subsequent reopening of the package at Police Headquarters was not the type of 'intrusion" contemplated by *Chadwick* at all because the package had already been lawfully opened at customs, and had been the subject of a controlled delivery to respondent. Rather, as recognized by the majority of courts to address this issue, the subsequent retaking and reopening of the package, following the controlled delivery, is merely the government's reassertion of actual physical possession over the package. (See Pet. Br. at 17-19) Furthermore, in this case, it is apparent that Labek had probable cause to arrest defendant when he saw defendant push the container into the hall. The seizure of the container was incident to arrest. *Chimel* v. *California*, 395 U.S. 752 (1969).

Respondent claims that "there was no 'controlled delivery' in this case." (Resp. Br. 13) He states that "[n]o evidence of continuity of seizure of the contents of the package was shown between the February 21 opening [at customs] and the time Labek picked up the already sealed package on February 22." (Resp. Br. 13) The facts belie respondent's contention. When the container was first opened by customs agents, they drilled several holes into the table top it contained and obtained a substance from within the table top which field tested positively for the presence of marijuana. On February 21, 1979, Agent Labek performed a "marquis" test on the substance, which had been extracted from the table top. (R. 25-26) The test demonstrated a positive reaction for the presence of marijuana. Agent Labek observed the metal container which was approximately four feet square and ten inches in depth. United States Customs agents informed Agent Labek that they had removed a table from the container. Agent Labek observed the table and described it as being round, dark in color, made of wood and being seven inches thick. It was heavily coated with laquer and gave off a deep shine. (R. 26-27) When Agent Labek next saw the package on February 22, 1979, the metal container had been resealed by customs agents.

It is clear that all of the actions regarding the container and the table from the time it came into customs custody until it left customs under Agent Labek's control were actions taken by law enforcement officials. All actions taken with respect to the table were within Labek's knowledge. It is immaterial whether Agent Labek actually viewed the resealing of the package. This Court

has long recognized that when law enforcement officers are working together, the knowledge of one officer is the knoweldge of all. *See*: *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971); *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965).[1]

Courts have consistently held that it is certainly permissible to allow contraband to reach its destination even if doing so takes a period of time and even if the contraband is shipped from place to place on the way to the intended destination. In *Chapman* v. *United States*, 443 F.2d 917 (10th Cir. 1971), a package containing contraband was inspected by customs in New York and then resealed and sent to Denver. The package was reopened by the Postal Inspector in Denver and then delivered to the defendant's home. Similarly, in *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973), a Los Angeles air freight supervisor opened a suitcase containing contraband. He notified the Los Angeles police, who resealed the bag and shipped it to New York. The bag was kept under surveillance by New York authorities who did not reinspect the contents before the defendant picked up the bag. In *McConnell* v. *State*, 595 P.2d 147 (Alaska 1979), *cert. denied* 444 U.S. 918 (1979), contraband was detected by an airline employee on February 25, 1977. He called Los Angeles police who observed the contraband, tested it, photographed it and removed some of it. The original package was resealed and placed on a flight to Anchorage. Without any surveillance of the package while it was on the airplane,

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[1] The Appellate Court of Illinois in its opinion incorrectly determined that an agent had to be observing the contraband every moment that it was in customs (Pet. Cert. 8a) or that the contraband had to be marked.

new officers met the airplane in Anchorage and took custody of the package. Thereafter, the officers made a controlled delivery to the defendant. Certainly, if such a procedure was proper in *Chapman*, *DeBerry*, and *McConnell*, then the procedure followed in the instant case was proper.

Respondent also suggests that because law enforcement officers allowed him to have physical possession of the package for thirty to forty-five minutes before arresting him there was no "controlled delivery in this case." (Resp. Br. 13-16) The facts, however, conclusively demonstrate that a controlled delivery did occur. After Officer Lipsek and Agent Labek delivered the package to respondent, Agent Labek saw respondent pull the package into his apartment while Officer Lipsek left to obtain a search warrant for the apartment. (R. 38) Agent Labek maintained surveillance within respondent's apartment building. During that time he saw respondent leave his apartment, walk down the common hallway and look out at the street through a hallway window. Thirty to forty-five minutes later, Agent Labek saw respondent push into the hall the same container which Labek had earlier delivered to respondent. (R. 32) At this point, Agent Labek arrested respondent. Later, at Chicago Police Headquarters when the container was opened, Officer Lipsek was present. Both Officer Lipsek and Agent Labek testified that the metal container was the same one they personally delivered to respondent at his apartment earlier that same day. (R. 32, 37-38)

Customs situations involving the controlled delivery of a previously searched object and a subsequent retaking and search of that object are not unique. This Court has never required law enforcement officials to maintain

constant physical possession or surveillance after an initial search and seizure of an object to later search or seize that object without a warrant. *See*: *United States* v. *Edwards*, 415 U.S. 800 (1974); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). In *United States* v. *Pringle*, 576 F.2d 1114 (5th Cir. 1978), a controlled delivery of heroin was made to defendants after a lawful customs inspection revealed that the package contained heroin. Agents replaced most of the heroin and inserted a beeper into the package. The package was delivered to and accepted by defendant Pringle at his home while government agents kept the premises under surveillance. Twenty minutes after the defendant accepted the package a second person, Elston, arrived. After arriving at Pringle's home, Elston was observed by agents peeking through the drawn blinds several times. He then left the house ten minutes later and the agents noticed a bulge beneath his jacket. The agents followed Elston's car and heard the signal from the beeper weaken as Elston drove away. They concluded Elston had the package. They stopped the car and seized the package in plain view.

There is a striking similarity between the facts in *Pringle* and the facts in the case at bar. In both cases the packages were examined pursuant to a lawful customs examination and were determined to contain contraband. In both situations a controlled delivery was made. In both situations the agents maintained surveillance of the premises and the package was in the physical possession of the defendant for approximately thirty to forty minutes, before the agents regained possession. While the agents did utilize a beeper device in *Pringle* to track the whereabouts of the heroin after defendant

Elston left with the package, in the instant case the agents testified that the container which they delivered to respondent was the same container that respondent pushed into the hallway. In the instant case, the respondent was arrested immediately after entering the hallway with the container and there is no question that the container recovered was the same container delivered by the agents to respondent.

In *United States* v. *Washington,* 586 F.2d 1147 (7th Cir. 1978), a controlled delivery of a package containing cocaine was made by agents following a lawful customs inspection of the package. One of the defendants carried the package into a house out of the sight of the agents. About five minutes later, several of the defendants left carrying a black plastic bag containing an object with the same size and dimension as the package. The defendants got into a Cadillac, drove to a restaurant, returned to the house, then drove from Quincy, Illinois, to Missouri and then to Iowa. The package was obviously out of the agent's view at all times. A beeper inserted into one of the objects in the package emitted a signal which the agents intercepted. Then, the Cadillac passed a truck and became lost from the agents' view. The agents could not find the Cadillac but received strong signals from the beeper. The Cadillac and the defendants were found later. The beeper and the object into which it had been inserted were found next to a creek bed. The black plastic bag was found in the Cadillac. It is obvious that as in the instant case the package containing the contraband was out of the sight of the agents conducting the surveillance for a period of time and in fact, in *Washington,* was not even recovered from defendants at the time of arrest. In *Washington*, the district court and the

court of appeals found that, based on the foregoing evidence, defendants were guilty beyond a reasonable doubt, and that the defendants' motions to suppress were properly denied. In the instant case, the respondent's guilt has yet to be determined, but certainly if the facts in *Washington* permit a denial of the motion to suppress and sustain a finding of guilt, then the highly similar facts of the instant case require a denial of respondent's motion to suppress.

Defendant's reliance on *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979) (Resp. Br. 10, 12) is misplaced. In *Edwards* the First Circuit Court of Appeals stated in *dicta* that law enforcement officials had relinquished "dominion and control" over a package by allowing defendant to transport the package by bus and car while followed by officers but out of the officers' control for over one hour. Were the *dicta* in the opinion in *Edwards* to be followed, law enforcement officials could never use a controlled delivery as a method of apprehending others who might be involved in a joint criminal enterprise with the person who initially receives the package which is the subject of the controlled delivery. In any event in the case at bar, Agent Labek never left the premises of respondent's apartment building during the entire period of the controlled delivery and did maintain reasonable, continuous surveillance.

Indeed, in the case at bar, the law enforcement officials were acting reasonably by allowing respondent to take the package into his apartment. This procedure allowed respondent to exercise additional control over the package beyond mere acceptance which could facilitate prosecution for the offense of possession. Ill. Rev. Stat. 1979, ch. 56½, sec. 704(e), sec. 705(e). Further, allowing respondent to take the package into his apartment increased the offi-

cers' chances of apprehending others involved in the criminal enterprise. *United States* v. *Pryba*, 502 F.2d 391 (D.C. Cir. 1974). All of the activities of the officers and agents in the instant case were consistent with the controlled delivery the agents were making. Finally, it should be noted that in a good faith attempt to comply with the law one of the officers left to obtain a warrant to enter the apartment when it became apparent that respondent was going to take the package into the apartment. It would surely be anomalous to interpret the fourth amendment to penalize the good faith acts of law enforcement officers in this case because they refrained from entering respondent's home without a warrant, and instead waited in the hallway keeping the apartment under surveillance until respondent fortuitously emerged with the container.

While recognizing the alternative extended border search argument made by the Solicitor General in his *amicus curiae* brief, the petitioner maintains that a controlled delivery was made in the instant case. The package, while it may have been out of the agents' physical possession for a short period of time, was always under their control. While it may have been prudent for Officer Lipsek to leave to obtain a warrant to enter respondent's home and regain possession of the container, the need for the warrant was obviated when Agent Labek saw respondent push the container into the common hallway. *See, Payton* v. *New York*, 445 U.S. 573 (1980).

Respondent additionally argues that there is "no need for a 'controlled delivery' exception to the warrant requirement." (Resp. Br. 16) Respondent has attempted to portray this as a new argument but it is merely a reiteration of his earlier argument that *Chadwick, supra*, requires the issuance of a warrant for the government to

open the container once it has come into respondent's possession. Yet, respondent has identified an "exception" to the warrant requirement which really is not an exception at all. Respondent forgets that unlike the package in *Chadwick,* the instant package was the subject of an initial, lawful customs inspection at which time the contraband was discovered. *United States* v. *Ramsey,* 431 U.S. 606 (1977). The package was then the subject of a controlled delivery by agents who maintained surveillance in respondent's apartment building, the same agents who reopened the package without a warrant. Every action taken by the agents was proper, and acceptance of the respondent's argument that a warrant was necessary to reopen the container trivializes the fourth amendment, because here the agents already knew that contraband was in the package due to the prior lawful, customs inspection.

Respondent also fails to recognize that the contraband which was seized and inspected at customs was contraband *per se,* and both the contraband and its container was subject to forfeiture under the provisions of 21 U.S.C. sec. 881(a)(1)(2)(3) and (f). In *United States* v. *Johnson,* 572 F.2d 227 (9th Cir. 1978), *cert. denied,* 437 U.S. 907 (1978), the ninth circuit upheld a second warrantless search of an automobile that had been in police custody for two weeks following the initial confiscation and search of the vehicle, pursuant to forfeiture statutes, which had revealed nothing. Clearly, if the second warrantless search of the vehicle in *Johnson* was proper after two weeks, then the second warrantless search of the container in the instant case, which was opened at police headquarters, shortly after the respondent's arrest, was proper. Moreover, in *Johnson,* after the vehicle was searched the second time the

government released it to defendant rather than bringing forfeiture proceedings. It was enough that forfeiture proceedings could properly lie to justify the impoundment of the vehicle and the warrantless search. The same must be said about the instant facts.

In summary, no warrant was required to justify the reopening of a package which had been sent through customs. Respondent had no legitimate expectation of privacy in the package because it was the subject of a prior lawful customs inspection, which could properly be conducted at random, and a subsequent controlled delivery. Rather, as properly recognized by the majority of courts, the retaking and reopening of the package was merely the actual reassertion of physical possession over a package in which respondent never had a legitimate expectation of privacy. Therefore, the subsequent reopening of the package at police headquarters was proper, since respondent had no rights in the package protected by the fourth amendment, and no warrant was required to justify the retaking and reopening of the package.

CONCLUSION

For all the foregoing stated reasons, petitioner respectfully requests that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand the case to the Circuit Court of Cook County, Illinois, for further proceedings.

Respectfully submitted,

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No. 81-1843

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS, PETITIONER

v.

JOHN ANDREAS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether law enforcement officers were required to obtain a search warrant before reopening a container that had been delivered under controlled conditions following discovery of marijuana in the container during the course of a lawful customs inspection.

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In the Supreme Court of the United States

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STATE OF ILLINOIS, PETITIONER

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ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents an important question concerning the application of the Fourth Amendment warrant requirement to situations in which contraband is discovered in a container during a lawful search and thereafter the container is resealed and delivered to the addressee under controlled conditions and is then retrieved and reopened by law enforcement officers. Such situations arise with some frequency and often involve federal law enforcement officers. In the present case agents of the federal Drug Enforcement Administration participated in testing contraband found in a container and delivering it under controlled conditions to respondent, who was the consignee of the container. In a typical case a federal customs inspector or a private party (e.g., an airline employee) who detects illicit drugs concealed in a package will contact federal drug enforcement officers. Those officers then arrange for a controlled de-

livery in an attempt to identify the individuals involved in a narcotics transaction. Suspects identified through the controlled delivery frequently are charged with violations of federal statutes. Thus, the Court's decision in this case may have a significant impact on federal investigations and prosecutions.

STATEMENT

Respondent was charged with possession of controlled substances, in violation of Ill. Rev. Stat. ch. 56½, §§ 704(e) and 705(e) (1979). Prior to trial in the Circuit Court of Cook County, Illinois, respondent filed a motion to suppress evidence of marijuana that had been found in a container delivered to him under controlled conditions. Although the container previously had been opened and the marijuana discovered in the course of a lawful customs inspection, respondent argued that law enforcement officers were required to obtain a warrant before reopening the container after the controlled delivery and arrest of respondent. Following a hearing, the trial court granted the motion to suppress the evidence (Pet. App. 1b-2b). The Appellate Court of Illinois, First Judicial District, affirmed (*id.* at 1a-12a). The Illinois Supreme Court denied a petition for leave to appeal (*id.* at 1c).

1. The evidence presented at the suppression hearing is summarized in the opinion of the court below (Pet. App. 1a-3a). That evidence showed that on February 21, 1979, federal customs inspector Ronald Drozek was working at the Lufthansa cargo facility at O'Hare International Airport. In the course of his work, Drozek inspected a sheet metal container that had been shipped from Calcutta, India, to respondent at a Chicago address. The container was approximately four feet square and eighteen inches thick and was secured by two locks. Drozek used keys attached

to the airline documents to open the container. Inside he found a wooden table top approximately three feet in diameter. Drozek drilled into the table top and discovered that it was filled with a substance that field tested positively as marijuana. Drozek then contacted federal Drug Enforcement Administration agents.

Later that day DEA agent Kenneth Labek saw the table top and tested the substance that it contained; the test confirmed that the substance was marijuana. Customs agents later repackaged the table top outside Labek's presence. The following day Labek returned and received the repackaged container from customs officials. He placed the container in a van, which he drove to respondent's Chicago address. Then Labek and a local police officer, Wayne Lipsek, posing as delivery men, advised security personnel at respondent's apartment that they had a package for him. After a few minutes respondent appeared and identified himself. When Labek told respondent that he and Lipsek were there to deliver the container, respondent replied, "Good. Where is it?" Respondent observed Labek and Lipsek remove the container from the van. When Lipsek commented that the container was quite heavy, respondent replied that it was not that heavy; that he had packaged it himself; and that it contained only a table (Tr. 30).[1] Labek and Lipsek carried the container to respondent's second floor apartment and, at his direction, left it in the hallway outside his door. Labek and Lipsek then walked to the end of the hall and turned a corner. From that position Labek looked back and saw respondent pull the container into his apartment. Lipsek left to obtain a search warrant for the container and apart-

[1] "Tr." refers to the transcript of the suppression hearing.

ment from a state judge (Tr. 38), while Labek remained inside the building. Approximately five minutes after respondent had pulled the container into his apartment, Labek observed him come out of the apartment, walk to a window at the end of a hallway, look outside in both directions and downward, and then return to the apartment. Labek was unable to see inside respondent's apartment or to keep respondent's door under continuous surveillance.

Around 30 to 45 minutes after the delivery, Labek saw respondent and the container in the hallway. Police then arrested respondent and notified Lipsek by radio that a warrant no longer was needed. Lipsek returned to the building, and he and Labek placed the container in the van and drove it to a police station (Tr. 18). Later in the day, in Lipsek's presence, the container was reopened, the table broken apart, and the marijuana removed. The officers who reopened the container did not obtain a warrant to do so.

2. The Illinois appellate court ruled that the warrantless reopening of the container was unlawful (Pet. App. 1a-12a).[2] Relying primarily upon *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), the court concluded that respondent had a reasonable expectation of privacy with respect to the contents of the container (Pet. App. 4a-5a). It rejected the State's contention that because the contents of the package were lawfully discovered, no warrant was necessary to reopen the container after a controlled delivery during which law enforcement officers had never lost custody over the container. The court distinguished cases in which courts had approved warrantless reopenings of

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[2] Respondent apparently did not challenge the initial search of the container by the customs inspector.

containers retrieved after controlled deliveries on the ground that in the cases cited the contraband had been marked and the package had been delivered under close surveillance (*id.* at 7a-8a). The court concluded that in this case law enforcement officers were not "absolutely sure" of the contents of the container, since Labek had not been present when the container was resealed after the customs inspection, Lipsek knew of the contents only by hearsay, and neither had observed the container during the period it was inside respondent's apartment (*id.* at 8a).[3]

SUMMARY OF ARGUMENT

1. The "controlled delivery" technique, used to deliver the container to respondent in this case, is an important law enforcement tool designed to identify persons responsible for movement of contraband and to determine whether those persons have knowledge of the illicit contents of a container. The court below held that officers should have obtained a warrant prior to reopening of a container following a lawful customs search and controlled delivery. However, federal courts of appeals and most state courts that have considered the question have concluded correctly that law enforcement officers need not obtain a warrant to reopen a container that has been searched lawfully and then delivered under controlled conditions. There is little point in requiring officers to obtain a warrant in such cases, since reopening of a container following a controlled delivery constitutes no greater invasion of the recipient's privacy than has occurred previously in the course of the lawful

[3] The court also rejected the State's claims (not renewed here) that the container was properly searched incident to respondent's arrest and that respondent had abandoned the container in the hallway (Pet. App. 9a-12a).

search. The reliance of the court below on *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), is misplaced, since those cases did not involve an earlier lawful search that served to dispel any reasonable expectation of privacy. The search of the container in this case also was lawful on the ground that it constituted an extended border search for which no warrant was required.

2. The court below concluded that a warrant should have been obtained for reopening of the container addressed to respondent because there was a break in surveillance of the container by law enforcement officers during the controlled delivery, so that the officers could not be "absolutely sure" that the contents of the container remained unchanged. This standard of absolute certainty is inappropriate. The relevant competing interests are best served by a holding that a warrant is not required to reopen a container following a controlled delivery provided there is no substantial likelihood at the time of reopening that the contents of the container are different from what they were at the time of the earlier search. The collective knowledge of different law enforcement officers who were involved at various stages of the controlled delivery in this case is sufficient to support a conclusion that the contents of the container remained intact. In addition, in the particular circumstances of this case, there was no substantial likelihood that the contents of the container changed during the period of 30 to 45 minutes when the container was inside respondent's apartment. Thus, the court below erred in suppressing the evidence of the marijuana retrieved from the container on the ground that no warrant had been obtained before the container was reopened.

ARGUMENT

LAW ENFORCEMENT OFFICERS WERE NOT REQUIRED TO OBTAIN A SEARCH WARRANT BEFORE REOPENING A CONTAINER THAT HAD BEEN DELIVERED UNDER CONTROLLED CONDITIONS FOLLOWING DISCOVERY OF MARIJUANA IN THE CONTAINER DURING THE COURSE OF A LAWFUL CUSTOMS SEARCH

A. The Fourth Amendment does not generally require a search warrant in connection with reopening of a container that previously was the subject of a lawful search and thereafter was delivered under controlled conditions

1. The delivery of a metal shipping container to respondent's apartment constituted a "controlled delivery," i.e., a delivery supervised by law enforcement officers. The controlled delivery technique is frequently employed after contraband has been discovered in the course of a lawful search of a container in transit.[4] That lawful search may be a customs inspection, as in this case, or a private search conducted by a common carrier employee, who then reports the discovery of contraband to law enforcement

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[4] For examples of recent cases in which controlled deliveries have occurred, see *United States* v. *Modica*, 663 F.2d 1173 (2d Cir. 1981), cert. denied, No. 81-1630 (May 24, 1982); *United States* v. *Sheikh*, 654 F.2d 1057 (5th Cir. 1981), cert. denied, No. 81-5828 (Mar. 1, 1982); *United States* v. *McGreevy*, 652 F.2d 849 (9th Cir. 1981); *United States* v. *Hackett*, 638 F.2d 1179 (9th Cir. 1980), cert. denied, 450 U.S. 1001 (1981); *United States* v. *Richards*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981); *United States* v. *Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Bulgier*, 618 F.2d 472 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States* v. *Barone*, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

authorities. Law enforcement officers use a controlled delivery as a way to identify the person or persons responsible for movement of the contraband and to ascertain whether they have knowledge of the illicit contents of the container. Such deliveries obviously serve important law enforcement functions. In *United States* v. *Bulgier*, 618 F.2d 472, 476, cert. denied, 449 U.S. 843 (1980), the Seventh Circuit described the use of controlled deliveries:

> Controlled deliveries of contraband apparently serve a useful function in law enforcement. They most ordinarily occur when a carrier, usually an airline, unexpectedly discovers what seems to be contraband while inspecting luggage to learn the identity of its owner, or when the contraband falls out of a broken or damaged piece of luggage, or when the carrier exercises its inspection privilege because some suspicious circumstance has caused it concern that it may unwittingly be transporting contraband. Frequently, after such a discovery, law enforcement agents restore the contraband to its container, then close or reseal the container, and authorize the carrier to deliver the container to its owner. When the owner appears to take delivery he is arrested and the container with the contraband is seized and then searched a second time for the contraband known to be there.

The federal courts and most state courts that have considered the question have concluded that law enforcement officers need not obtain a search warrant in order to reopen a container that has been searched lawfully and then delivered under controlled conditions. These courts generally have reasoned that seizure occurred at the time of the initial lawful search, that the container remained within official control

throughout the course of the controlled delivery, and that reopening of the container constituted merely a reassertion of control over what previously had been seized. See, e.g., *United States* v. *Bulgier*, *supra*, 618 F.2d at 475-478; *United States* v. *Andrews*, 618 F.2d 646, 650-654 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Ford*, 525 F.2d 1308, 1312-1313 (10th Cir. 1975); *United States* v. *DeBerry*, 487 F.2d 448, 450-451 (2d Cir. 1973). See also cases listed at 2 W. LaFave, *Search and Seizure* § 5.5(e), at 87 n.90 (Pocket Part 1982). But see *People* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980), cert. granted, judgment vacated and remanded, 453 U.S. 919, on remand, 127 Cal. App. 3d 317, 179 Cal. Rptr. 530 (1981), petition for cert. pending, No. 81-1916. The courts have concluded correctly that official control of a container continues even after delivery is made, so long as law enforcement officers continue their surveillance.

There is little point in requiring law enforcement officers to obtain a warrant before reopening a container following a lawful search and controlled delivery. Any invasion of the recipient's privacy interest in the contents of the container obviously occurred in the course of the initial lawful search that resulted in the discovery of contraband. Given the fact of the initial search, the subsequent reopening of the container following a controlled delivery constitutes no greater intrusion into privacy than what already has occurred. Since there is no incremental invasion of the recipient's privacy, there is no reason to require a warrant. See, e.g., *United States* v. *Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (once a citizen's Fourth Amendment privacy interest has been invaded legally by an official

of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion). This is in substantial part the justification for the well recognized plain view exception to the warrant requirement. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467-468 (1971).

Indeed, a majority of this Court has indicated that no warrant is required for a second search by law enforcement officers that is no more intrusive than an earlier private search. *Walter* v. *United States*, 447 U.S. 649, 656, 659 n.14 (1980) (Stevens, J.); *id.* at 661 (White, J.); *id.* at 663, 665 (Blackmun, J., dissenting). Moreover, since the officers already know (and in fact have seen) the contents of the container, a warrant requirement would be a needless formality.[8] As Professor LaFave suggests, the approach of the controlled delivery cases is a sensible one, "because the earlier viewing of the contents (which could not have changed in the interim) makes the probable cause so certain as to be beyond question, thus obviating the need for a pre-search judicial assessment of whether the police are entitled to open the container." 2 LaFave, *supra*, § 5.5(e) at 90 (footnotes omitted).

Reopening of a container without a warrant following a controlled delivery is fully consistent with the Fourth Amendment standards set out by this Court. In *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979) (footnote omitted), the Court stated that the

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[8] Since there is nothing for law enforcement officers to "discover" when, following a controlled delivery, they reopen a container whose contents they have already seen, it is unlikely that the reopening constitutes a "search" at all. See *United States* v. *Richards*, *supra*, 638 F.2d at 773-774 (Gee, J., concurring).

reasonableness of an action is judged "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." See also *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976). On the one hand, reopening of a container following a controlled delivery results in no incremental intrusion on privacy beyond that which occurred in the course of the earlier lawful search. On the other hand, requiring a warrant in such a case would impose a needless burden on law enforcement operations and would weaken the protections of the warrant procedure by trivializing it.[6] The balance of interests weighs heavily against a warrant requirement in such situations.

The court below relied on *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), for the proposition that respondent had an expectation of privacy in the container delivered to him and that a warrant therefore was required. But both *Chadwick* and *Sanders* involved a materially different situation from that in the present case. While the officers in those cases had probable cause to conduct a search, there had been no governmental inspection of the interior of Chadwick's trunk or Sanders' suitcase prior to the challenged warrantless searches. Thus, those defendants retained a reasonable expectation of privacy protected

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[6] Of course, it may be difficult to anticipate in advance what sort of warrant would be appropriate in a controlled delivery situation. See, e.g., *People* v. *Riegler*, *supra*, in which a warrant was obtained for search of the residence to which packages were delivered, but the packages eventually were retrieved from a vehicle that had been driven away from the residence approximately half an hour after the delivery.

by the Fourth Amendment. Here, the lawful customs inspection in which the marijuana was discovered served to dispel any legitimate privacy interest respondent otherwise might have had.[7] Accordingly, *Chadwick* and *Sanders* do not govern the present case. See *United States* v. *Bulgier*, *supra*; *United States* v. *Andrews*, *supra*.

2. Reopening of the container following controlled delivery to respondent also can be justified on the ground that it constituted an extended border search. Customs officers have broad authority to inspect packages from abroad without either a warrant or probable cause. *United States* v. *Ramsey*, 431 U.S. 606, 616-619 (1977).[8] In this case, the container arrived by air from India and was subject to a customs search at O'Hare International Airport, the "functional equivalent" of the border. See *id.* at 622; *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273

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[7] A high level of probable cause normally would not excuse the failure to obtain a warrant. However, this Court suggested in *Sanders* that some types of containers "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." 442 U.S. at 764-765 n.13. Under this analysis the contents of a container that previously has been viewed by law enforcement officers in the course of a lawful search need not even be inferred, so that the container is a fortiori not entitled to Fourth Amendment protection so long as its contents are known to remain the same.

[8] The basis for the border search exception to the warrant requirement is the right of the sovereign to protect itself from the introduction into its borders of individuals or items whose mere presence is illegal. See *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925).

(1973). The subsequent reopening of the container at the police station can be characterized as an extended border search.[9] Under the extended border search doctrine, courts have recognized that border searches need not always take place at the border itself or the functional equivalent of the border, but for investigative reasons may be conducted at some distance from the border. As in the case of a normal border search, neither probable cause nor a warrant is required. The courts of appeals have generally held that an extended border search may occur when it is reasonably certain that the object searched has crossed the border and has remained unchanged since it crossed the border. See, e.g., *United States* v. *Richards*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981); *United States* v. *Bilir*, 592 F.2d 735, 741 (4th Cir. 1979); *United States* v. *Fogelman*, 586 F.2d 337, 344 (5th Cir. 1978). Like the controlled delivery technique, the extended border search plays an important role in law enforcement efforts to identify "higher-ups" in narcotics operations. See *United States* v. *Martinez*, 481 F.2d 214, 218 (5th Cir. 1973), cert. denied, 415 U.S. 931 (1974).

The present case presents facts similar to those in *United States* v. *Richards*, *supra*, in which the Fifth Circuit applied the extended border search doctrine. In *Richards* a customs inspector in New York had examined a package mailed from Thailand when it entered the United States. The inspector discovered contraband and contacted DEA agents, who arranged for the package to be resealed and sent by locked pouch to its destination. Richards picked up the package at the post office and was arrested

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[9] The record indicates that customs agents were present when the container was reopened. See Tr. 36.

as he was about to drive away. The court held that law enforcement officers were not required to obtain a warrant before reopening the package after Richards' arrest, since the reopening constituted an extended border search.

B. The break in surveillance by law enforcement officers during the controlled delivery in this case did not justify a requirement that the officers obtain a warrant before reopening the container

The court below appears to have accepted the proposition that a warrant would not be required to reopen a container in most controlled delivery cases.[10] However, it concluded that the controlled delivery cases did not govern this case because the law enforcement officers here were not "absolutely sure" of the contents of the container when they reopened it (Pet. App. 8a). In support of its conclusion, the court cited the facts that Labek, the DEA agent, had not been present when customs officials replaced the table top and resealed the container; that Lipsek, the local police officer, knew of the container's contents only through hearsay; and that the contents of the container might have been altered while the container was inside respondent's apartment.

The court erred in concluding that a warrant is required to reopen a container following a controlled delivery unless law enforcement officers are "absolutely sure" that the contents remain the same as

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[10] The court stated (Pet. App. 6a) (citations omitted):

> Where there is a prior legal search of property, a valid seizure by police officers predicated upon that search, and a delivery to the addressee made under the direction and control of police, a subsequent search which occurs at the termination point of the delivery may be conducted without a warrant as it constitutes a reassertion of possession and is deemed part of the first search and seizure.

they were at the time of the earlier lawful opening. Such an extreme standard is inappropriate. The practical features of a controlled delivery may make it impossible to meet the sort of absolute certainty test the court applied here. A controlled delivery often involves transfer of an object from one set of law enforcement officers to another, sometimes to a different part of the country. Even if a controlled delivery takes place within a single geographical area, a container may be in the custody of customs agents, DEA agents, local police, or other types of officers at various stages. Once a delivery is made, it often will not be practicable to maintain surveillance of the container at every moment, since the recipient may move the container and may take it into an automobile or building where it is temporarily out of sight of law enforcement officers. Indeed, the purpose of the controlled delivery procedure would in many circumstances be defeated if the recipient of the package were not permitted to take custody of it for at least a brief period of time. In most cases, however, any gaps in surveillance will be relatively short, and it will be most unlikely that there has been any change in the contents of a container during these periods, either because of the brevity of the interruption of surveillance or because other circumstances indicate that it is improbable that there has been a change.[11] Thus, a lesser stan-

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[11] In the extended border search cases the courts have found a reasonable certainty that an object remained unchanged after it crossed the border, despite gaps in surveillance. See, e.g., *United States* v. *Bilir*, *supra*, 592 F.2d at 738, 741 (5½-hour period when suspects were inside hotel room); *United States* v. *Martinez*, 481 F.2d 214 (5th Cir. 1973), cert. denied, 415 U.S. 931 (1974) (35-minute gap in surveillance of truck carrying contraband).

dard than absolute certainty seems appropriate. We suggest that the relevant competing interests are best accommodated by a holding that a warrant is not required to reopen a container following a controlled delivery provided that there is no substantial likelihood at the time of reopening that the contents of the container are different from what they were at the time of the earlier search.

The court below was clearly wrong in suggesting that the same law enforcement officer must be present at every stage of a controlled delivery in order to avoid the need to obtain a warrant for reopening. The courts have recognized that when law enforcement officers are working together, it is proper to look to their collective knowledge, rather than solely to the knowledge of any particular individual, to see, for example, whether there was probable cause for a search or arrest. See, e.g., *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971); *United States* v. *Kreimes*, 649 F.2d 1185, 1189 (5th Cir. 1981); *United States* v. *Wright*, 641 F.2d 602, 606 (8th Cir.), cert. denied, 451 U.S. 1021 (1981); *United States* v. *Bernard*, 623 F.2d 551, 560-561 (9th Cir. 1979); *United States* v. *Laughman*, 618 F.2d 1067 (4th Cir.), cert. denied, 447 U.S. 925 (1980); *United States* v. *Clark*, 559 F.2d 420, 424 (5th Cir.), cert. denied, 434 U.S. 969 (1977); *United States* v. *Woods*, 544 F.2d 242, 259-260 (6th Cir. 1976), cert. denied, 429 U.S. 1062, 430 U.S. 969, 431 U.S. 954 (1977). See also *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965). Under the "collective knowledge" doctrine, the knowledge of successive law enforcement officers at various stages of the operation should be sufficient to support a finding that the contents of the container remained intact. Here both the customs agent, Drozek, and the DEA agent, Labek, viewed the contents of the con-

tainer when it was initially opened. It is entirely unreasonable to hypothesize that customs officials might not have repackaged and resealed the container in accordance with the plan for controlled delivery.[12] Labek communicated the information about the contents of the container to local police, including Lipsek, who was present during the actual delivery and again at the reopening of the container. The collective knowledge of these officials was clearly sufficient to support the conclusion that the contents of the container remained intact during its repackaging and delivery.

The court below also was concerned with the gap in surveillance during the period of 30 to 45 minutes when the container was out of view inside respondent's apartment. Such a gap does create a close question in this case, and in some cases might lead to the conclusion that there was a substantial likelihood that the contents of the container had changed.[13] In the particular circumstances of this case, however, we believe that there was no substan-

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[12] Certainly an affidavit for a warrant in this case would not have failed to make out probable cause, or even had its force in the least diminished, for lack of an averment from the customs agent that the container was repackaged as planned.

[13] For example, if the container were a tote bag or a briefcase that had been delivered to an individual's home, it might be logical to conclude that the container could have been unpacked and refilled with different items in the course of a period of 30 to 45 minutes. In the case of a specialized shipping container, such as the one in this case, it might be reasonable to assume that the contents would remain unchanged during a short period, but unreasonable to assume that they remained intact a week after delivery unless there were some way to determine that the container had not been opened during that time.

tial likelihood that the contents of the container changed during the period the container was inside respondent's apartment, so that it would be reasonable to permit a warrantless reopening.[14] Although the officers were unable to observe the container directly for a period of 30 to 45 minutes, Labek observed respondent in the hallway checking a window, apparently to see whether the "coast was clear," suggesting that respondent intended to transport the contraband to another location. When Labek again saw the container, respondent had brought it into the hallway, confirming that he was planning to take it away. After respondent had been arrested, Labek and Lipsek lifted the container into the van (Tr. 18), enabling them to observe that it was the same weight as when they had carried it up to respondent's apartment. Given the size and specialized nature of the container, which apparently was designed for shipping large items, it was most unlikely that

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[14] Indeed, the circumstances of this case suggest that petitioner also could meet the "reasonable certainty" test that has been applied in some extended border search cases. See, e.g., *United States* v. *Richards, supra,* 638 F.2d at 773 (suggesting that warrant will not be required when it appears with reasonable certainty that contents of mail have not been altered since it entered the United States); *United States* v. *Garcia,* 672 F.2d 1349 (11th Cir. 1982); *United States* v. *Driscoll,* 632 F.2d 737, 739 (9th Cir. 1980), citing *United States* v. *Potter,* 552 F.2d 901, 907 (9th Cir. 1977). The Fifth Circuit has described the reasonable certainty standard as "something more than probable cause, but less than beyond a reasonable doubt." *United States* v. *Niver,* 689 F.2d 520, 526 (1982). In many extended border search cases there has been no earlier search, so that it is not known whether contraband is being carried. A lesser standard than that of reasonable certainty seems appropriate in cases in which the existence of contraband has been confirmed as the result of an earlier lawful search.

respondent would have removed the table top and repacked the container with some object of similar weight. In addition, given the need to drill into the table top to retrieve the substance within, it was virtually certain that respondent could not have altered the contents of the table top itself during the time it was inside his apartment.[15]

Given the absence of any substantial likelihood that the contents of the container had changed by the time the law enforcement officers reclaimed it, reopening of the container following respondent's arrest was unlikely to entail any incremental invasion of privacy beyond what had occurred during the lawful customs search.[16] Under these circumstances it would have been pointless to require law enforcement officers to obtain a warrant before reopening the container in order to retrieve what they knew was there.[17] The

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[15] The court below also noted that the contraband had not been marked (Pet. App. 7a-8a). Under the circumstances of this case, in which the contraband was located inside a table top, marking would have been an unnecessary measure.

[16] Moreover, it can hardly be said that respondent had any reasonable expectation of privacy in the contents of the package following his arrest. Since customs inspectors have the right to examine any package mailed from abroad to the United States, a consignee of such a package must realize that its contents may have been examined. Respondent presumably was told, or realized, at the time of his arrest that the law enforcement officers knew the contents of the container and the table top. Compare *United States* v. *Andrews*, *supra*, 618 F.2d at 652.

[17] It might be argued that in cases in which there has been some break in surveillance, there is a role for a neutral magistrate to play, that is, to determine whether there is a substantial likelihood that the contents of the container have been altered, and, if so, whether there is nevertheless justifi-

court below erred in suppressing the evidence of the contents of the container on the ground that no such warrant had been obtained.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

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DECEMBER 1982

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cation for examination of its contents. However, we do not believe this is so in a case such as the present one. At least in cases in which the break in surveillance has been brief and in which a limited number of people have had access to the container, a search would be reasonable whether or not the contents had changed. If the contents had not changed, there would be no incremental invasion of privacy beyond the earlier lawful invasion, as we have suggested. If, on the other hand, the contents had changed, this would be highly relevant evidence that a consignee had received contraband knowingly. In either case, a magistrate presumably would authorize issuance of a warrant. Thus, there appears to be little meaningful role for a magistrate in a case such as this one.

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NO. 81-1843-CSY	TITLE	Illinois, Petitioner v. John Andreas

DOCKETED	COURT
Apr. 3, 1982	Appellate Court of Illinois, First Judicial District

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Joan S. Cherry
	Counsel for Respondent:
Apr. 3, 1982	Petition for writ of certiorari filed. (Record filed).
May 12, 1982	DISTRIBUTED. 5-27. (Stricken)
May 25, 1982	Response requested.
June 24, 1982	Brief for the respondent in opposition filed.
June 30, 1982	DISTRIBUTED. SL5P1
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	Petition GRANTED.

Nov. 22, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Dec. 10, 1982.
Dec. 16, 1982	Brief, amicus curiae of the United States filed.
Dec. 13, 1982	Brief for the petitioner filed. (AND JOINT APPENDIX)
Jan. 10, 1983	Brief for the respondent filed.
Jan. 25, 1983	CIRCULATED.
March 22, 1983	Reply brief for the petitioner filed. (D).
March 30, 1983	ARGUED.